

# **EXHIBIT 1**



*CFTC v. Gemini*

## **Summary Judgment Presentation**

*July 23, 2024*

## Summary Judgment Should Be Denied



- 1 The statements were true**
- 2 Attribution is disputed**
- 3 Materiality is disputed**
- 4 Knowledge of falsity is disputed**

All of these issues are jury questions

# Summary Judgment Should Be Denied



## 1 Overview of Evidence

## 2 Key Legal Issues

- Attribution
- Materiality
- Knowledge/*mens rea*

## 3 Disputed Issues of Fact

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• Prefunding</li><li>• Pearl Street Loans</li><li>• Operational Advances</li></ul> | <ul style="list-style-type: none"><li>• Volume</li><li>• Rebates</li><li>• Self-Crossing</li></ul> |
|--|--|



# Overview

## **Cboe Made the Self-Certification**



Case 123-Sub1-Sub2-Sub3 Page 10 of 24 Page 6 of 20

Cboe

1500-1501

Christopher J. Schipani  
Secretary  
Disciplinary Counsel's Office  
Texas Lawyers' Committee  
1100 Main Street, Suite 300  
Waco, Texas 76701

THIS IS KARIBA

Pursuant to Section 1(a)(1) of the Commodity Exchange Act, as amended ("Act") and Rule 1.1 of the regulations promulgated by the Commodity Futures Trading Commission ("CFTC" or "Commission"), we file the Asia Clear Futures Exchange ("ACE" or "Exchange")'s initial written terms and conditions for a cash-settled futures option to be traded on ACE, which is Cboe Options® (CBOE®) ("Cboe"). The initial written terms and conditions for the cash-settled futures option to be traded on ACE are set forth below. The initial written terms and conditions for cash-settled futures options on Cboe Options® ("Cboe Options") are set forth in Cboe's Initial Written Terms and Conditions for Cash-Settled Futures Options on Cboe Options, dated April 12, 2011, which is incorporated by reference into this document.

SBF Issues are cash-settled futures contracts that are listed on the exchange group of exchanges in US dollars on the CME Group Exchange. SBF Issues are designed to reflect economic dynamics related to the price of futures. The initial settlement value for SBF Issues will be the initial futures price estimated to be the latest price of the futures determined at 11:00 a.m. Eastern time on the first settlement day in the CME Group Exchange.

Hillock is a digital asset based on the decentralized open source protocol of the blockchain system Ethereum known as "Ethereum NFTs". The Hillock Network looks to revolutionize politics, economics, and culture through the Blockchain to make art more accessible. We sought after ways to expand the Hillock Network. The effectiveness of the Hillock Network can be measured by a decentralized and open source. Hillock can be used to

**1.000 producători din România se potrivesc să aplice OJ 27 înainte de 10 iunie și împărtășească astfel cunoștințele.**

- Only Cboe could file a self-certification
  - Submitted on Cboe letterhead
  - Signed by Cboe
  - Product named “Cboe Bitcoin futures” product
  - Traded on the Cboe Futures Exchange
  - Gemini not cc'd or included on transmittal
  - Gemini not mentioned in press releases

# Evidence Regarding the Statements



Case 1:22-cv-04563-AKH Document 83-8 Filed 07/24/24 Page 8 of 230

Cboe

December 1, 2011

Christopher J. Kilkpatrick  
Secretary  
Commodity Futures Trading Commission  
Dana Edinboro Complex  
1155 20th Street, N.W.  
Washington, D.C. 20581

Re: Cboe Futures Exchange, LLC Product Application for Market Approval  
Supplementary Material CFTC-0111-C-08

Dear Mr. Kilkpatrick:

Pursuant to Section 5(a)(1) of the Commodity Exchange Act, as amended ("Act") and Rule 162 of the regulations promulgated by the Commodity Futures Trading Commission ("CFTC"), or "Commission" under the Act, Cboe Futures Exchange, LLC ("CFTC" or "Exchange") hereby submits terms and conditions for a non-deliverable futures product to be traded on CFTC called Cboe Micro (USD) ("CFTC Futures Product") and accompanying risk disclosures to interpret the Product and CFTC rules ("Amendment"). The Amendment consists of new Chapter 13 of the CFTC's Handbook, pursuant to CFTC Rules and related documents, namely, CFTC Rule 1.10 (Definitions), CFTC Rule 1.11 (General Provisions), CFTC Rule 410 (Guidelines of Conduct for Public Persons), CFTC Rule 413 (Risk Disclosure), CFTC Rule 419 (Guidelines of Liability), Legal Proceedings, CFTC Policy and Procedure V (Emergency and Physical Emergency Dispositions), and CFTC Policy and Procedures XVA (Interconnection Time Fractions). A chart that summarizes the Product specifications is also attached. The terms and conditions for S&P 500 futures and the Amendment will become effective on December 1, 2011 ("Effective Date"). All futures will be traded on trading on CFTC on a date to be announced by the Exchange through the issuance of a circular that is sent to and after the Effective Date.

S&P futures are cash-settled futures contracts that are based on the market price of futures at U.S. dollars on the Gemini Exchange. S&P futures are designed to reflect economic exposure related to the price of futures. The final settlement value for S&P futures will be the official session price rounded to the nearest penny for futures denominated in U.S. dollars and to the next tenth of a cent for futures denominated in Canadian dollars.

Gemini is a digital asset based on the decentralized open source protocol of the peer-to-peer Bitcoin payment network ("Bitcoin Network"). The Bitcoin Network uses its decentralized public blockchain ledger, known as the Blockchain, on which all tokens are recorded. No single entity can control the Bitcoin Network. The infrastructure of the Bitcoin Network is collectively maintained by a decentralized user base. Tokens can be used to

\* The product conditions shall not constitute or imply a CFTC endorsement or the use of implied conditions, or terms, specific to this product.

- Gemini has substantial evidence **all statements were true**
- Gemini has substantial evidence **all statements were not material**

## Gemini Was Completely Transparent



- Gemini never refused to answer any question from CFTC
- Gemini never refused to answer any question from Cboe
- Gemini never refused to provide any trading data or documents

## Gemini Was Completely Transparent



Rose Toomey  
Lead API Developer



- Q. Who instructed you to provide information to Cboe in an accurate manner?
  - A. Well, separately, Cameron and Tyler Winklevoss introduced me to Dennis O'Callahan. Sorry, by "separately", I mean Michael Breu had put me into contact with Stephanie Marrin's office, while around that same time Cameron and Tyler Winklevoss had asked me to — had asked me and my colleague, Noah Cornwell, to contact Dennis O'Callahan.
- Q. Okay. And they instructed you to report information to Cboe in an accurate manner?
  - A. They asked me, as I recollect, to provide as much detail as possible to answer whatever questions that they had, to arrange — to arrange to create and provide whatever datasets that they requested.

## Gemini Gave Everything Anyone Asked For



**Arthur Reinstein**

*Cboe Lawyer*

**Q. Are you aware of any question asked to Gemini that Gemini did not answer?**

**A. Asked by who?**

**Q. Asked by either CBOE or CFTC during the course of the self-certification.**

**A. I don't recall that occurring. I don't have a recollection of that.**

## Gemini Gave Everything Anyone Asked For



Nicole Gordon

Cboe Lawyer

Q. And there was not one instance where you recall Gemini not responding to a question that Cboe posed, right?

A. Not that I recall.

Q. So fair to say **Gemini was fully cooperative** in this process, right?

A. **I think I would agree with that.**

## Evidence of Gemini's Approach to Process



- Provided all trade data on an ongoing basis for monitoring
- Made changes to User Agreement requested by Cboe
- Made changes to auction requested by CFTC



## **Attribution: Did Gemini Make the Statements?**

## Cboe Made the Self-Certification



Case 123-Sub1-Sub2-Sub3 Page 10 of 24 Page 6 of 20

Cboe

1000-1001

Christopher J. Schipani  
Secretary  
Disciplinary Counsel, Indiana  
Bar Examination Commission  
1125 Zionsville Road, N.W.  
Waukegan, IL 60085

David Koffman

SBF Issues are cash-settled futures contracts that are listed on the exchange group of exchanges in US dollars on the CME Group Exchange. SBF futures are designed to reflect economic exposures inherent in the price of futures. The initial settlement value for SBF futures will be the initial futures price estimated to be the latest price of the futures determined at 11:00 a.m. Eastern time on the first settlement day in the CME Group Exchange.

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**1.000 producători din România se unesc în rețeaua de amplasatori O2B, membrană a cărei rol este să împreună dezvolte și să crească sprijinul.**

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## Cboe Made the Self-Certification



Open Access Article DOI: 10.1039/C4RA02274A

Cboe

1800-1801

Champlain 2 Subplot 4  
Spartan  
Crossley Forest Study Area  
Three Lakes Conservation  
1155 2nd Street, N.W.  
Winnipeg, P.O. V8P 1E1

1.200.7200.1111 - Prepaid Landline for Whole Domains, Special Offer \$100

THIS IS RICHARD

JKT Investors are cash-settled futures contracts that are listed on the Jakarta price. The contract is U.S. dollars on the Jakarta Exchange. JKJ futures are designed to reflect exchange rates between the price of gold. The final settlement value for JKJ futures will be the official foreign price estimated in the target period for the month determined at 1500 g/m. Settlement will be made in Indonesian Rupiah on the Jakarta Exchange.

<sup>1</sup> This is a slightly more refined set of the differentiated open source products of the previous one. Other products include "Project Network". The Network Manager tool can be used to monitor and manage multiple different services across the Stackable or other open source environments. We might even say it replaces the Router Manager. The functionality of the Router Manager is effectively increased by a distributed open source host. Router can be used to

• Els pioners en els pioners dels nous models de negocis (O2, T-Mobile, etc.) han estat els impulsors d'aquesta transformació.

CFE believes that the impact of the Product and Amendment will be beneficial to the public and market participants. CFE sought and received input from market participants regarding the Product and Amendment in a number of ways and took that input into consideration in the design and implementation of the Product and Amendment. CFE is not aware of any substantive opposing views to the Product and Amendment. CFE hereby certifies that the Product and Amendment comply with the Act and the regulations thereunder. CFE further certifies that CFE has posted a notice of pending certification with the Commission and a copy of this submission on CFE's Web site (<http://cfe.cbow.com/aboutcfe/rules.aspx>) concurrent with the filing of this submission with the Commission.

Questions regarding this submission may be directed to Arthur Reinstein at (312) 786-7570 or Nicole Gordon at (312) 786-8109. Please reference our submission number CFE-2017-018 in any related correspondence.

Cboe Futures Exchange, LLC

S/ Andrew Lowenthal

By: Andrew Lowenthal  
Senior Managing Director

## Cboe Submitted Other Statements “to the Commission”



- The statements were made in 9 separate documents
- Cboe sent 8 of those documents “to the Commission”
- Gemini was not copied on any of those documents



Dkts. 83-2; 83-4; 83-6; 83-9; 83-10; 83-11; 100-6; 100-21; 100-22

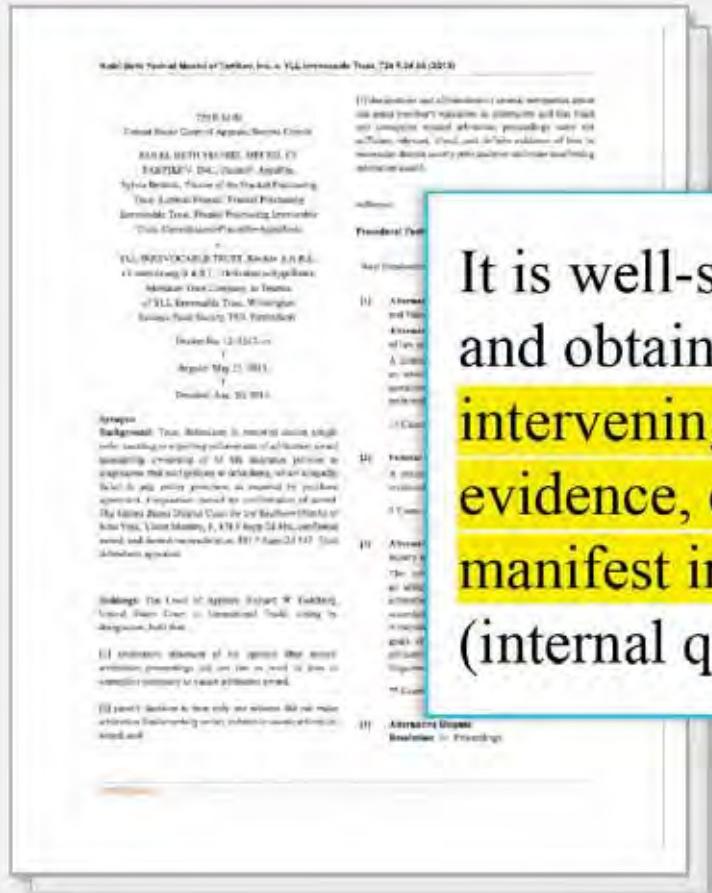
## **Attribution: The Law**

## The Law of the Case



ORDER denying [80] Motion for the Partial Summary Judgment Whether and to what extent defendant is the maker of the representations passed on to the CFTC by the Chicago Finance Exchange is a question of fact. And whether and to what extent the rule of Janus Capital Group, Inc. v. First Derivatives Traders, 364 U.S. 135 (2011) and SEC v. Pentagon Mgmt plc, 725 F.3d 279 (2d Cir. 2013) applies in the context of CFTCs oversight of commodities exchanges and companies seeking to use the facilities of the exchange to trade futures contracts, and the manner used by the CFTC to gather information necessary and relevant to its supervisory obligations, also present questions of fact. (HEREBY ORDERED by Judge Alvin K. Hellerstein)(Text Only Order) (Hellerstein, Alvin)

# The CFTC Has No Grounds for Reargument



It is well-settled that a party may move for reconsideration and obtain relief only when the defendant identifies “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Virgin Atl. Airways, Ltd.*, 956 F.2d at 1255 (internal quotation marks omitted).

## Section 6(c)(2) Requires *Making a Statement to the Commission*



**(2) Prohibition regarding false information**

It shall be unlawful for any person **to make** any false or misleading statement of a material fact **to the Commission**, including in any registration application or any report filed with the Commission under this chapter, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

# Janus Is Directly Applicable



**One “makes” a statement by stating it.** When “make” is paired with a noun expressing the action of a verb, the resulting phrase is “approximately equivalent in sense” to that verb. 6 Oxford English Dictionary 66 (def.59) (1933) (hereinafter OED); accord, Webster’s New International Dictionary 1485 (def.43) (2d ed. 1934) (“Make followed by a noun with the indefinite article is often nearly equivalent to the verb intransitive corresponding to that noun”). For instance, “to make a proclamation” is the approximate equivalent of “to proclaim,” and “to make a promise” approximates “to promise.” See 6 OED 66 (def.59). The phrase at issue in Rule 10b-5, “[t]o make any ... statement,” is thus the approximate equivalent of “to state.”

For purposes of Rule 10b-5, **the maker of a statement is the person or entity with ultimate authority over the statement**, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest who prepares or publishes a statement on behalf of another is not its maker.

## The Situation in *Janus*



*See Janus*, 564 U.S. at 147-48

# The CFTC Knows Section 6(c) Is Modeled on Section 10(b)



CourtListener.org/CBA/PK Document 29 Filed 11/13/23 Page 1 of 41 PageID 102

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING  
COMMISSION Plaintiff v. Case No. 23  
FISHER CAPITAL LLC, AMS CONSULTING  
SOLUTIONS LLC, and ALEXANDER  
SPILLANE, d/b/a "Alexander Overle" Defendants  
Plaintiff  
Defendants

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION  
DEFENDANT'S MOTION TO TRANSFER VENUE

Section 6(c) of the CEA was modeled on Section 10(b) of the Securities Exchange Act, “which the Supreme Court has interpreted as a ‘catch-all clause to prevent fraudulent practices,’ *Monex*, 931 F.3d at 976 (quoting *Chiarella v. United States*, 445 U.S. 222, 226 (1980).) Presumably, “by copying § 10(b)’s language and pasting it in the CEA,” Congress contemplated that the two statutes would be interpreted similarly. *Id.*

Pl.’s Opp’n Def.’s Mot. Transfer Venue at 26 n.10, *CFTC v. Fisher Capital LLC, et al.*, No. 1:23-cv-03121-CBA-PK (E.D.N.Y., Nov. 13, 2023), Dkt. 29

## The CFTC Ignores Second Circuit Authority Applying *Janus*

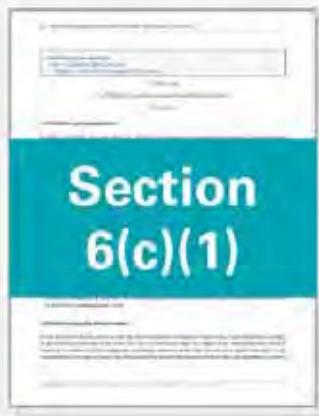


*SEC v. Pentagon Cap. Mgmt. PLC, 725 F.3d 279  
(2d Cir. 2013)*

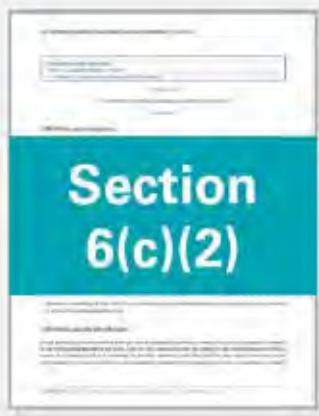
*SEC v. Norstra Energy Inc., 202 F. Supp. 3d 391  
(S.D.N.Y. 2016)*

*SEC v. Rio Tinto PLC, 2019 WL 1244933  
(S.D.N.Y. 2019)*

## Section 6(c)(2) Does Not Apply to “Indirect” Statements



It shall be unlawful for any person, **directly or indirectly**, to use or employ, or attempt to use or employ ... any manipulative or deceptive device or contrivance ....



It shall be unlawful for any person to make any false or misleading statement of a material fact **to the Commission** ....

## The CFTC Elected Not to Charge a “Causing” Violation



§ 161. Requirements for insurance licensees, § 161(1) & 162

State Board for Insurance  
Title 2, Insurance Code section:  
Chapter 1, Insurance Business, Part II, section:

§ 161A. § 161

§ 161. Responsibility of licensed licensees—

Definitions

(a) Any person who, directly or indirectly, sells, does, causes, controls, induces, encourages, or recommends the placement of a coverage of any of the products or services offered by any of the persons, organizations, or educational institutions in this program, or influences in any manner, direct or indirect, any other person to do such violence, or who willfully causes an act or behavior in excess of violent behavior performed or caused by force or coercion would be evidence of the presence of the intent of one or more such violations, or violates only the field supervisor for such violence to a participant.

(b) Any person who, directly or indirectly, controls any person who has violated any provision of this chapter or any of the rules, regulations, or policies imposed in this chapter may be held liable for such violation to the same extent as the Commissioner for the same violation as such controlling person. To clarify further, the Commissioner holds the individual person that she controlling person did not act in bad faith or knowingly without directly or indirectly allowing or causing such violation.

(c) Violations in this chapter shall be committed in, occurring in, or originating at the Commonwealth.<sup>3</sup> A person means a citizen of the Commonwealth, or a person who appears that the person's conduct does not represent such status.

CREDITS

(App. 2), 1991-1992 § 161, as added 1991, ch. 100, § 1, eff. Jan. 1, 1992; 87 Stat. 14, § 1, (amended 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005).

<sup>3</sup>Section 161. Definitions 1/1.

Footnotes

1. See original. The words "in the Commonwealth" probably should not appear.

2. Title 2, § 161A.1.1.c

3. Section 161.1.1.c. 1991-1992 § 161, Section 161.1.1.c. 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2002-2003, 2003-2004, 2004-2005.

**(a)** Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who **willfully causes an act to be done** or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal.

## The CFTC's Reliance on Section 1001 Is Misplaced



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 [ANSWER KEY](#) [PRINT](#) [EMAIL](#)

1000-10000 mg  
1000-10000 mg

and I hope no one goes unnoticed in this section, however, as our main website has much better coverage of the history of the French Navy, I will not add anything.

1970-71, which is shown in Fig. 10, shows a similar trend to the last two years.

(3) make a generally firm, however, on fiscal and monetary cooperation.

(b) **Initial Period.** Each individual having the right to receive compensation under this section shall be entitled to receive compensation for the period from the date of his or her initial employment by the agency until the date of his or her termination of employment by the agency.

and he thus considers this impression as more than 5 years old if he often remembers it as occurring 5 years ago, or more than 8 years, in fact. If the memory is older than 10, 12, or 15 years, he considers it as more than 15 years old.

~~any liability for damage arising from the use of any part or any product containing, or that may contain, any such material.~~

Journal of Health Politics, Policy and Law, Vol. 35, No. 4, December 2010  
DOI 10.1215/03616878-35-4 © 2010 by the Southern Political Science Association

(ii) administrative issues, including a claim for permanent or interim relief for the presence or replacement providers, or support services, or a claim for repayment of fees made or negotiations to be conducted.

(2) any investigation or inquiry, conducted pursuant to the authority of any committee, investigating committee or officer of the Congress concerning any particular matter of the House of Representatives.

- (a) Except as otherwise provided in this section, whoever, **in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government** of the United States, knowingly and willfully--

  - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
  - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
  - (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

**Section 1001 does not require that statements be made *to* the government agency**

## **Plaintiff's Section 1001 Cases Are Inapplicable**



Davis first argues that he did not violate section 1001 because he made documents containing false statements *from*, not *to*, the federal agencies. This distinction is irrelevant because **there is no requirement that a false statement made to the federal agency; it must only have been made in “any matter within the jurisdiction of any department or agency of the United States.”** 18 U.S.C. § 1001 (emphasis added)

## CFTC's Reliance on Executive Cases Is Misplaced



- CFTC's cases involve executives who made statements in capacity as company's agents
- Gemini, like JCM, was a "separate and independent entity"

Dkt. 93 at 16-18; *In re Pfizer Fees. Litig.*, 2012 WL 983548, at \*4 (S.D.N.Y. Mar. 22, 2021)  
(quoting *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 2011 WL 3444199, at \*25 (D.N.J. Aug. 8, 2011))

## Attribution: The Record

## **Cboe Made the Self-Certification**



Case 123-Sub1-Sub2-Sub3 Page 10 of 24 Page 6 of 20

Cboe

1500-1501

**Thompson & Thompson  
Spartan  
Discordant Forces Testing Laboratories  
Texas Education Center  
1122 22nd Street, N.W.  
Washington, D.C. 20031**

**Journal of Clinical Endocrinology, 111(1), Original Article from The Endocrine Society  
Volume 111, Number 1, January 2000, pp 1-15**

W. M. Kallivick

S&P futures are cash-settled futures contracts that are traded on the exchange group of futures in U.S. dollars on the Comex Exchange. S&P futures are designed to reflect commodity prices in the price of futures. The final settlement value for S&P futures will be the official futures price estimated to be the highest point the futures descended to in 1990 plus an amount chosen by the cash-settled date to be the futures Exchange.

Hansen is a digital asset based on the decentralized open source protocol of the blockchain network Ethereum (commonly known as "Ethereum Blockchain"). The Hansen Network tracks the decentralized public consensus about America in the Blockchain on which all transaction is recorded. No single entity can or operates the Hansen Network. The effectiveness of the Hansen Network is effectively measured by a decentralized open base. Hansen can be used to

• Els problemes d'obstrucció a la respiració són molt comuns en els infants i els joves adolescents amb síndrome de Down.

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## Cboe Had the Final Decision About What to Say



Arthur Reinstein  
*Lawyer*



- Q. It was ultimately **CBOE that had the final decision** about what to say in this document; is that fair?
- A. Yes.
- Q. And **it was ultimately CBOE's decision** whether or not to pursue a self-certification in this case, right?
- A. Yes

## Cboe Was Responsible for What the Self-Certification Said



**Gregory Kuserk**

*Deputy Director –  
Division of Market Oversight*



- Q. And **the DCM has the ultimate responsibility** for the content of the self-certification, correct?
- A. Yes.

Dkts. 109-57 (Kuserk Tr. 59:21-60:1, 60:7); *see also* 83-17 (Goodman Tr. 288:4-12)

## Gemini Did Not Have Control



**Cameron Winklevoss**  
*President*

**"We provided information to CBOE, but we did not have control or agency on what information, necessarily, they chose or how they chose to present that to the CFTC. Ultimately, they are the interface between us and the CFTC. We were not – it's not our application."**



## The CFTC Miscites the Record: Cboe Had Ultimate Authority



Arthur Reinstein

*Lawyer*

Cboe

Q. And CBOE had the authority to change or modify those submissions as it believed appropriate; is that fair?

A. I think that we had the authority to do so. If we were going to do so related to something that was not in our personal knowledge, meaning not something related to our market but related to Gemini, then we would have vetted that with Gemini. I don't think we would have just changed something.

CFTC Cites

But we did, I believe to your point of your question, have ultimate authority to submit the document.

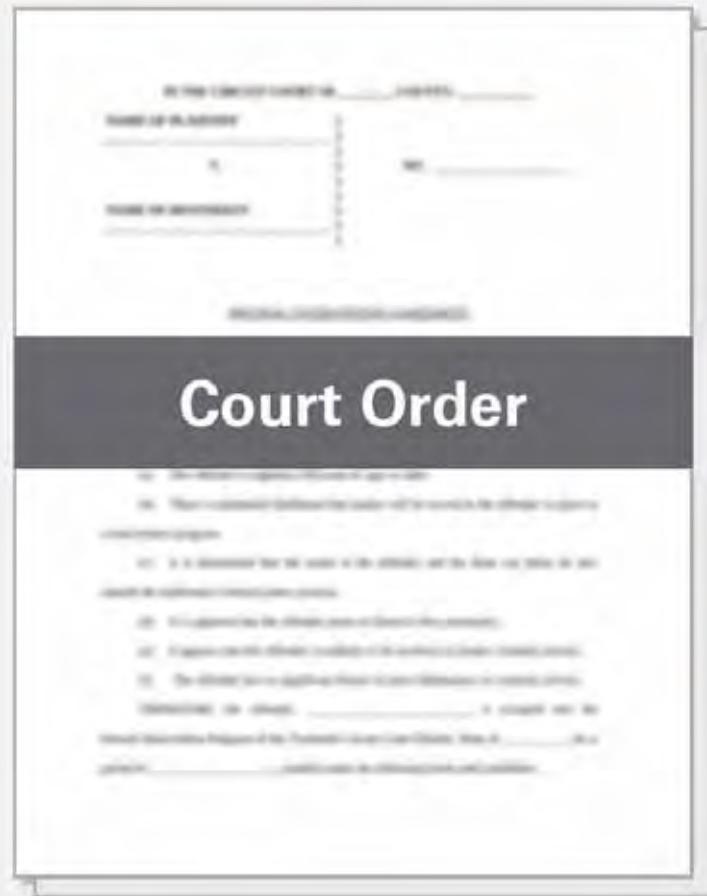
CFTC Omits

## The CFTC Wants It Both Ways



- CFTC argues that Gemini can be liable for statements made to Cboe
- \*\*\* BUT \*\*\***
- CFTC also argues that Gemini cannot rely on statements to Cboe as part of its defense

## Proposed Resolution of the Motions



- 1** The Court should grant Gemini's motion for summary judgment as to Statements 1-16, 18, 25-31
  
- 2** The Court should hold a trial on attribution as to Statements 17, 19-24



# Materiality



# The Definition of Materiality

U.S. v. Litvak, 808 F.3d 160 (2015)  
808 F.3d 170 (2d Cir. 2015)

**P** In re Litvak, No. 14-cv-0004 (D.C. Cir., 2015)

Decided by panel: —— (D.C. Cir., 2015)

Argued: May 11, 2015  
Decided: Dec. 5, 2015

**Summary:**  
Background: Defendant moved for judgment of acquittal or new trial, relating to his conviction for two counts of securities fraud, one count of fraud relating to Troubled Asset Relief Program (TARP), and two counts of making a false statement in a matter within jurisdiction of United States government, relating to defendant's role as insurance broker and trader in connection to residential mortgage-backed securities (RMBS). The United States District Court for the District of Columbia (John F. Keay) denied Plaintiff's motion. Defendant appealed.

Holdings: The Court of Appeals found: Plaintiff failed to establish that the evidence did not constitute a reasonable doubt for either securities fraud or TARP-related charges.  
 (1) issue was whether the evidence of securities fraud charges was sufficient to sustain a conviction of securities fraud.  
 (2) issue is whether there is a requirement for sufficient evidence of securities fraud.  
 (3) appeal testimony regarding process that investment managers use to evaluate RMBS and relevance of defendant's representation to that process, should not have been excluded on grounds of lack of relevance.

West Handbook (2d):  
 [1] **Criminal Law** ➔ **Fraud in connection with the sale of securities**  
 [2] **Criminal Law** ➔ **Securities Fraud**  
 [3] **Criminal Law** ➔ **Fraud in connection with the sale of securities**  
 As a general matter, a defendant challenging the sufficiency of the evidence of a felony violation in the standard of review is not entitled to a new trial.  
 [4] **Criminal Law** ➔ **Fraud in connection with the sale of securities**

[5] **Criminal Law** ➔ **Laws concerning the conduct of government and of government officials**  
 [6] **Criminal Law** ➔ **Securities Fraud**  
 [7] **Criminal Law** ➔ **Selling securities**  
 [8] **Criminal Law** ➔ **Securities Fraud**

When a defendant challenges the sufficiency of the evidence, the court of appeals must consider the evidence in the light most favorable to the Government, according every inference that could have been drawn by the Government from, and deducing at the jury's assessment of what was reasonably and an interpretation of the weight of the evidence.

"[A] statement is material if it has a natural tendency to influence, or be **capable of influencing, the decision of the decisionmaking body to which it was addressed.**"

*United States v. Litvak, 808 F.3d 160, 170 (2d Cir. 2015);*

*see also United States v. Rigas, 490 F.3d 208, 231 (2d Cir. 2007); United States v. Calderon, 944 F.3d 72, 85 (2d Cir. 2019)*

## Material Means Important, Not Relevant



"All of these specifications of the materiality inquiry target the same question: **would the misrepresentation actually matter in a meaningful way** to a rational decision maker?"

*United States v. Calderon, 944 F.3d 72, 86 (2d Cir. 2019)* (emphasis in original)



"Defendants' misrepresentations certainly concerned a variable that mattered to the banks.... **But 'relevance' and 'materiality' are not synonymous.**"

*United States v. Rigas, 490 F.3d 208, 234 (2d Cir. 2007)*

# Material Means Important, Not Relevant



“Half-truths,” or “representations that state the truth only so far as it goes, while omitting critical qualifying information,” can also be actionable misrepresentations. *Escobar*, 579 U.S. at 191.

# Materiality Depends on Evidence



- “[T]he materiality of a statement rests upon a factual evidentiary showing”
- Establishing materiality requires “proof”
- Defendant can contest materiality with “evidence”

*Kungys v. United States*, 485 U.S. 759, 772, 774-777 (1988)

# Materiality Depends on Evidence



U.S. v. Gaudin, 515 U.S. 506 (1995)  
F15 E.C. 2510; 1327-94-5744-CR-LJW-B/5

**Plaintiff**  
United States, Plaintiff  
versus  
Michael E. Gaudin,  
Defendant.

Argued April 17, 1995.  
Decided June 19, 1995.

**Opinion**  
Defendant was convicted in the United States District Court for the District of Montana, Paul W. MacLean, Chief Judge, of obstructing justice in connection with transactions involving federal owned mortgages and making false statements in areas within jurisdiction of government agency. Defendant appealed. The Court of Appeals for the Ninth Circuit affirmed as to one, reversed as to another, and remanded as to others. 95-3514. Certified and granted. The United States Supreme Court, Justice Souter, held the Constitution required juries to return a jury question of materiality of defendant's plausible false statements in matter within jurisdiction of federal agency.

**Alleged**  
Court held (Circuit reversed and Remanded based on failure to instruct on facts and law):

**Actual Harmless (7)**

(1) Constitutional Law (c) (Obstruction of Justice);  
Fraud (c) (Obstruction of Justice);  
Due process clause and Fifth Amendment right to just and impartial trial judge to return a jury question of materiality of defendant's plausible false statements in matter within jurisdiction of federal agency; defendant had right to demand

that just and impartial all elements of crime and materiality was element of crime, including (1) *Gaudin* v. United States, 796 F.2d 178 (1986) (constitutional); 5 U.S.C. § 706 (2000).

(2) Constitutional Law (c) (Right of prompt trial);  
Constitutional Law (c) (Witness Rights);  
Fraud (c) (Obstruction of Justice);  
Due process clause and Fifth Amendment right to just and impartial trial judge to return a jury question of materiality of defendant's plausible false statements in matter within jurisdiction of federal agency; defendant had right to demand (2) *Gaudin* v. United States, 796 F.2d 178 (1986) (constitutional); 5 U.S.C. § 706 (2000).

(3) Constitutional Law (c) (Mixed question of law and fact);  
Fraud (c) (Obstruction of Justice);  
Question whether defendant's allegedly false statement in matter within jurisdiction of federal agency was material to agency's decision is mixed question of law and fact generally resolved by judge. 10 U.S.C. § 800 (2000).

(4) Constitutional Law (c) (Question of Law or fact);  
Fraud (c) (Obstruction of Justice);  
Due process clause and Fifth Amendment right to just and impartial trial judge to return a jury question of materiality of defendant's plausible false statements in matter within jurisdiction of federal agency; defendant had right to demand

By limiting the jury's constitutionally prescribed role to "the factual components of the essential elements" the Government surely does not mean to concede that the jury must pass upon all elements that contain some factual component, for that test is amply met here. Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts. What the Government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. We see two difficulties with this. First, the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries.

## Materiality Requires Evidence



Defendant's misstatements were **not material because Government submitted no evidence** demonstrating they were capable of influencing Treasury Department.

*United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015)



Misstatements were **not material because no evidence** banks' investment decisions would have been affected.

*United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007)



Statements were material when government "**presented substantial evidence at trial**" that banks would have rejected bills of lading had they not been altered.

*United States v. Calderon*, 944 F.3d 72 (2d Cir. 2019)

# Materiality Is a Jury Question



Case 2:20-cv-00376-wmc Document # 181 Filed 04/18/22 Page 1 of 3

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

COMMODITY FUTURES TRADING  
COMMISSION AND SECURITIES  
EXCHANGE COMMISSION

## CLOSING JURY INSTRUCTIONS

A factual statement is “material” if a plaintiff establishes by a preponderance of the evidence that there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether or not to buy or sell fund shares given the total mix of information.

*CFTC v. Walczak et al., Nos. 20-cv-075-wmc & 20-cv-076-wmc (W.D. Wis. Apr. 18, 2022)*

# Materiality Is a Jury Question



Case 4:19-cv-02901 Document 234 Filed on 08/05/22 in TXSD Page 1 of 18

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff,

v.

EOX HOLDINGS L.L.C., and  
ANDREW GILLENHALL,

Defendants.

CIVIL ACTION NO. 4:19-cv-02901

JURY CHARGE

INSTRUCTIONS TO THE JURY

"Material" information is information that a reasonable trader would consider significant in the decision whether to trade, a fact that alters the "total mix" of information available to a reasonable trader. A minor or trivial detail is not material.

Instructions to the jury are intended to assist the jury in understanding the law and the parties' contentions.

In these instructions, the term "plaintiff" or "CFTC" shall be used to mean Plaintiff Commodity Futures Trading Commission.

*CFTC v. Eox Holdings, LLC et al., No. 4:19-cv-02901(S.D. Tex. Aug. 5, 2022)*

## The CFTC's Reliance on Tax Cases Is Misplaced



In order to establish a violation of § 7206(2), the government must prove that a tax return is false as to a material matter. In the present case, the itemized deductions on the income tax returns of Klausner's clients constituted material matters if they were essential to the accurate computation of the clients' taxes. See *United States v. Warden*, 545 F.2d 32, 37 (7th Cir.1976) ("The test of materiality with respect to a false return case is whether a particular item must be reported in order that the taxpayer estimate and compute his tax correctly." (quotation omitted)); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir.1969)

**This is not the standard applicable in this case**

*United States v. Klausner*, 80 F.3d 55, 60 (2d Cir. 1996)

# The CFTC's Reliance on *eFloorTrade* Is Misplaced



As to materiality, it is undisputed that, as of the September 2015 hearing, the CFTC's investigation required an examination of eFloorTrade's records concerning trading instructions or signals that it received from TPTSs. (See Def. Resp. to Pltf. R. 56.1 Stmt. (Dkt. No 57) ¶ 80; Giglio Decl. (Dkt. No. 51-42) ¶¶ 6-8).

Beginning in at least March 2014, the CFTC's investigation required, in part, an examination of the trading instructions or signals EFT received from third party trading systems on behalf of its customers, order tickets or other written records of customer orders, and all other records that are part of the audit trail relating to the placement and execution of customer orders in order to determine whether EFT made and kept required books and records and whether customer orders were properly entered and executed. Giglio Decl ¶¶ 4, 6, 7

**RESPONSE:** Admit.

**Unlike here, the CFTC *had evidence of impact***

*CFTC v. eFloorTrade, LLC*, 2018 WL 10625688, at \*8 (S.D.N.Y. Sept. 21, 2018); Dkt. 57 ¶ 80, *CFTC v. eFloorTrade, LLC*, No. 1:16-cv-07544-PGG (S.D.N.Y. Nov. 22, 2017)

## **What Decision Did the CFTC Make?**

## Sample Questions the CFTC Refused to Answer



**Christopher Goodman**  
*Economist*



- **What decisions does the CFTC make** concerning self-certifications?
- **Can you testify to any decision that the CFTC made** with respect to the CBOE self-certification filed December 1st, 2017?
- Without revealing the substance of any internal commission communications, **are you aware of any decision the CFTC made** with respect to the CBOE self certification filed on December 1st, 2017?
- **Did the CFTC ever make any decisions whatsoever** with respect to the 2017 CBOE Bitcoin futures contract self-certification?

**There is *no evidence* of any decision – only speculation**

## Sample Questions the CFTC Refused to Answer



Christopher Goodman  
Economist

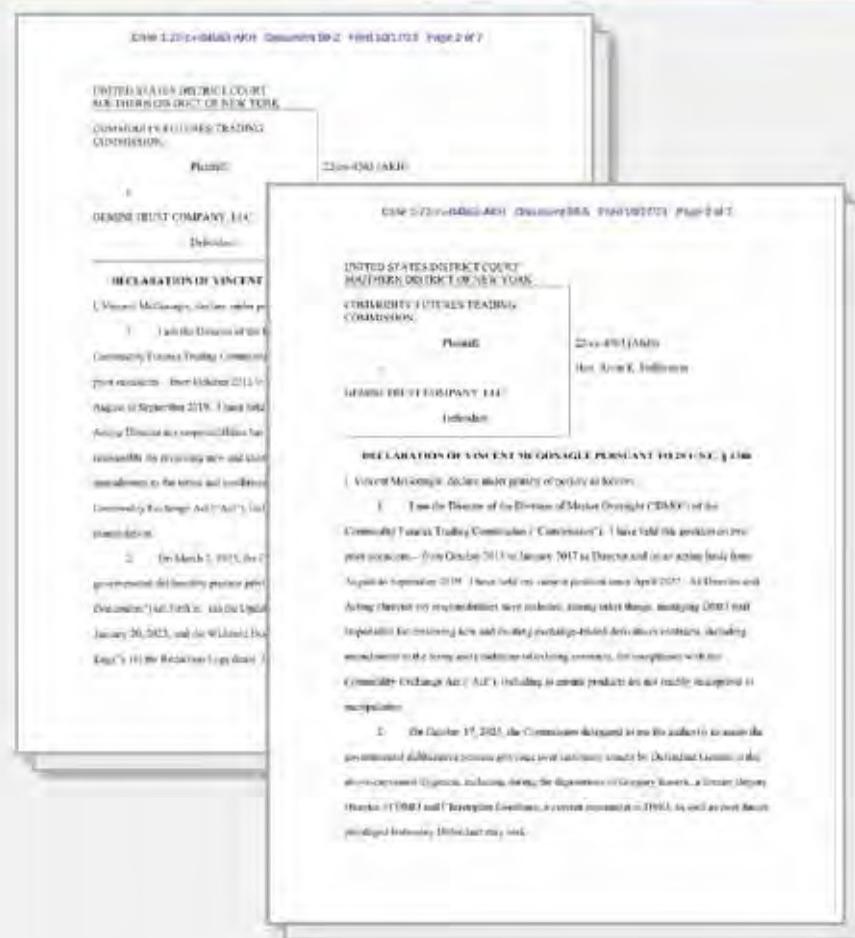
- What did the CFTC look into to determine whether or not [the Gemini] exchange [was] readily susceptible to manipulation?
- Do you recall why you asked Question 8 [about rebates] on [the August 25 submission]?
- Do you recall why you asked Question 10 [about self-trading] on [the August 25 submission]?
- Do you remember why you didn't ask any questions about prefunding to Gemini or Cboe?



Gregory Kuserk  
Deputy Director –  
Division of Market Oversight

There is *no evidence* of what the CFTC actually considered or how – only speculation

# The CFTC's Improper Reliance on the McGonagle Declarations



- The CFTC did not identify McGonagle:
  - In Rule 26 initial disclosures
  - In response to Rule 33 interrogatories
- The CFTC did not include McGonagle on its witness list
- The CFTC did not cite the McGonagle affidavits in its moving papers – only in reply
- The affidavits are **inadmissible hearsay**

Dkts. 59-2; 59-5

# The CFTC's Hail Mary Reply Argument About Rule 40.2



CASE NUMBER: 22-cv-04563-AKH Document 131 Filed 07/24/24 Page 56 of 230

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
COMMODITY FUTURES TRADING  
COMMISSION

Plaintiff:

v.

GEMINI TRUST COMPANY, LLC

Defendant:

PLAINTIFF COMMODITY F  
REPLY MEMORANDUM  
MOTIONS FOR PARTIES

June 26, 2024

[T]he CFTC's decisionmaking authority with respect to product certifications is unquestionable because it is set out in the statutory and regulatory framework. Under the express language of Rule 40.2 the CFTC can request "additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, the requirements of the Act or the Commission's regulations or policies thereunder." 17 C.F.R. § 40.2(b) (emphasis added). The CFTC can also "stay the listing of a contract" under certain circumstances, including during proceedings for "filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions." *Id.* § 40.2(c). These provisions confirm that the CFTC, not only has the ability to make decisions, but also possesses the authority to review product certifications for compliance.

**The CFTC *never* made this argument before**

Dkts. 118 at 21-22; see also 123 at 21

## Knowledge / *Mens Rea*

## The CFTC's Core Principles Apply to "DCMs"



Commodity Futures Trading Commission	Pt. 3B
(ii) statistical procedures for the compilation and/or dissemination of statistics from trading activity, including the book value, volume, and value of external audit findings, self-audited errors or through validated complaints;	(ii) statistical procedures for the compilation and/or dissemination of statistics from trading activity, including the book value, volume, and value of external audit findings, self-audited errors or through validated complaints;
(D) Requirements for procedure. In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall ensure the procedure is standard, the handling, management, review, redistribution, retention, and disposal of documentation does:	(D) Requirements for procedure. In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall ensure the procedure is standard, the handling, management, review, redistribution, retention, and disposal of documentation does:
(i) annual reports; (ii) in general, in accordance with rules prescribed by the Commission, the chief compliance officer shall annually submit a report that contains a description of:	(i) annual reports; (ii) in general, in accordance with rules prescribed by the Commission, the chief compliance officer shall annually submit a report that contains a description of:
(A) the compliance of the swap structure facility with the Act and;	(A) the compliance of the swap structure facility with the Act and;
(B) the policies and procedures, including the date of entry and content of interest period, of the swap structure facility;	(B) the policies and procedures, including the date of entry and content of interest period, of the swap structure facility;
(C) Management. The chief compliance officer shall:	(C) Management. The chief compliance officer shall:
(i) furnish early report described in clause (i) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 17(a) of the Act;	(i) furnish to the report a certification that, under penalty of law, the report is accurate and complete;
(ii) challenge [Reserve];	(ii) challenge [Reserve];
(iii) appropriate procedures—(a) determination of whether the facilities and other relevant information of the swap structure facility or potential swap structure facility are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, the swap structure facility has the discretion to base the determination on the nature of the swap structure facility and the related circumstances, including, but not limited to, compliance experience, related market experience, location, and any other relevant factors to the position. A swap structure facility should be explicitly cognizant regarding potential conflicts of interests when appointing a chief compliance officer.	(iii) appropriate procedures—(a) determination of whether the facilities and other relevant information of the swap structure facility or potential swap structure facility are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, the swap structure facility has the discretion to base the determination on the nature of the swap structure facility and the related circumstances, including, but not limited to, compliance experience, related market experience, location, and any other relevant factors to the position. A swap structure facility should be explicitly cognizant regarding potential conflicts of interests when appointing a chief compliance officer.
17 CFR 3.2001, July 6, 2003, as amended at 73 FR 47426, Aug. 28, 2008, at 73 FR 62282, Sept. 9, 2008; 78 FR 2265, Feb. 11, 2013.	
<b>PART 3B—DESIGNATED CONTRACT MARKETS</b>	
Support A—General Provisions	
(A) Requirements.	
(i) Eligibility.	
(ii) Exemptions.	
(iii) Procedures for designation.	
(iv) Procedures for listing products and implementing economic market rules.	
(B) Information relating to existence and nature of swap structure facility.	
(C) Self-auditing.	
(D) Prohibited use of data collected for regulatory purposes.	
(E) Listings of swaps on a designated contract market.	
(F) Swaps of trade operating both a legitimate contract market and a swap execution facility.	
(G) Reporting of swaps traded on a designated contract market.	
(H) Trade execution confirmations schedule.	
(I) Forms for a designated contract market to make those available to trade.	
<b>Support B—Designation of Contract Market</b>	
(A) Core Principles I.	
<b>Support C—Compliance With Rules</b>	
(B) Core Principles II.	
(C) Access requirements.	
(D) Absentee trading practices prohibited.	
(E) Capacity to detect and prevent material violations.	
(F) Regulatory services provided by a third party.	
(G) Compliance staff and resources.	
(H) Automated trade surveillance system.	
(I) Best bids market surveillance.	
(J) Deadlines and prioritization reports.	
(K) Ability to obtain information.	
(L) Additional swap requirements.	
<b>Support D—Contracts Not Subject to Manipulation</b>	
(M) Core Principles III.	
(N) Additional measures for compliance.	
<b>Support E—Prevention of Market Disruption</b>	
(O) Core Principles IV.	
(P) General requirements.	
(Q) Additional requirements for preventing market-disruptive conduct.	
(R) Additional requirements for market-disruptive conduct.	
(S) Ability to obtain information.	
(T) Risk controls for trading.	
(U) Trade representations.	
(V) Regulatory notice provider.	
(W) Additional measures for compliance.	
<b>Support F—Position Limitations or Accountability</b>	
(X) Core Principles V.	
(Y) Position limitations and accountability.	

Cboe is a DCM

## Gemini is not a DCM

# The CFTC's Self-Certification Rules Apply to "DCMs"



**§40.2**

this chapter, and, if so, the name of either the swap reference firm or contract or the swap related entity of which the swap referenced contract submitted under this part is based;

(viii) Delivery place and location price differentials;

(ix) Delivery standards and procedures, including fees related to delivery or the delivery process, alternative to delivery and applicable penalties or sanctions for failure to perform;

(x) If cash settled, the definition, composition, calculation and revision of the cash settlement price or index;

(xi) Payment or collection of claim-duty option premiums or margins;

(xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(xiii) Threshold prices for an option contract, the conditions of which it can terminate prior to maturity;

(xiv) Any restrictions or requirements for exercising an option; and

(xv) For a swap:

(i) Identification of the major group, category, type or class in which the swap falls such as an interest rate, commodity, credit or equity swap and of any further sub-group, category type or class that further describes the swap;

(ii) Notional amounts, quantity standards, or other unit size characteristics;

(iii) Any applicable premiums or discounts for delivery of non-delivery products; and

(iv) Provisions for calculating the payment obligations under and mark-to-market value of the swap including, as applicable, the initial start date, termination or maturity dates, and, in each leg of the swap, the initial cash flow components, spreads, and points, and the relevant interest, price, rates, coupons, or other price reference measures;

(v) Any price limits, trading rules, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(vi) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the

contract meets the definition of potentially equivalent swap as defined in 116.103(b)(1); and

(vii) The name of either the swap reference firm or contract or the swap related entity of which the swap referenced contract submitted under this part is based;

(viii) Payment and reset frequency, day count conventions, business calendar, and accrual nature;

(ix) If physical delivery applies, delivery standards and procedures, including fees related to delivery or the delivery process, alternatives to delivery and applicable penalties or sanctions for failure to perform;

(x) If cash settled, the definition, composition, calculation and revision of the cash settlement price, and the settlement currency;

(xi) Payment or collection of option premiums or margins;

(xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(xiii) Threshold prices for an option, the exercise of which is contingent upon these prices;

(xiv) Any restrictions or requirements for exercising an option; and

(xv) Daily cash events;

17 CFR 40.2, 7/27/2011, as amended on 09/06/2011, 7/1/2012

**140.2. Listing products for trading by certification.**

(a) A designated contract market or swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under 140.5 of this part or has not been designated otherwise for listing and submitted under this section or approved under 140.5 of this part. A submission shall conform with the following conditions:

(i) The designated contract market or the swap execution facility has filed its submission electronically on a form and in a manner specified by the Secretary of the Commission with the Secretary of the Commission;

(ii) The Commission has received the submissions by the open of business on the business day preceding the product's listing; and

(iii) The submission includes:

§24

Cboe is a DCM

Gemini is not a DCM

## Gemini Reasonably Relied on Cboe



**Christopher Goodman**  
*CFTC Economist*

Q. Do you know if there is a common understanding or practice among industry participants to what information the CFTC wants to receive in evaluating compliance with core principle 3?

A. Yeah, I would say that that varies depending on exchange.

**Exchanges that have been through the process a few times are — you know, generally have a better understanding than newer exchanges.**

Dkt. 100-11 (Goodman Tr. 90:11-21)



**Nicole Gordon**  
*Cboe Lawyer*

Q. And is it also fair to say that at the time of the self-certification, to your knowledge, Gemini had never been involved in that process before, right?

A. To my knowledge, yes.

Q. Is it fair to say Gemini was relying on Cboe in connection with the self-certification?

A. I think that's fair.

Q. So Gemini relied on Cboe to identify what information was needed in connection with the self-certification is that fair?

A. Yes.

Dkt. 109-18 (Gordon Tr. 101:2-12)

## Gemini Was Completely Transparent



- Gemini never refused to answer any question from CFTC
- Gemini never refused to answer any question from Cboe
- Gemini never refused to provide any trading data or documents

## Gemini Was Completely Transparent



Rose Toomey  
Lead API Developer



- Q. Who instructed you to provide information to Cboe in an accurate manner?
  - A. Well, separately, Cameron and Tyler Winklevoss introduced me to Dennis O'Callahan. Sorry, by "separately", I mean Michael Breu had put me into contact with Stephanie Marrin's office, while around that same time Cameron and Tyler Winklevoss had asked me to — had asked me and my colleague, Noah Cornwell, to contact Dennis O'Callahan.
- Q. Okay. And they instructed you to report information to Cboe in an accurate manner?
  - A. They asked me, as I recollect, to provide as much detail as possible to answer whatever questions that they had, to arrange — to arrange to create and provide whatever datasets that they requested.

Dkt. 109-12 (Toomey Tr. 438:16-439:5)

## Gemini Gave Everything Anyone Asked For



**Arthur Reinstein**

*Lawyer*



**Q. Are you aware of any question asked to Gemini that Gemini did not answer?**

**A. Asked by who?**

**Q. Asked by either CBOE or CFTC during the course of the self-certification.**

**A. I don't recall that occurring. I don't have a recollection of that.**

# Gemini Made All Trade Data Available to Cboe and CFTC



## Information Sharing Agreement

This Information Sharing Agreement (this "Agreement"), dated as of September 25, 2017, is by and between Gemini Trust Company, LLC (hereinafter referred to as "Gemini") and Chicago Board Options Exchange, Incorporated (hereinafter referred to as "CBOE"), on behalf of itself and CBOE Trading Venues (as defined below). Gemini and CBOE are each hereinafter referred to as a "Party" or collectively as the "Parties."

1. For purposes of this Agreement:
  - a) "CBOE Trading Venues" means any affiliates of CBOE that are self-regulatory organizations and are regulated by either the U.S. Securities and Exchange Commission ("SEC") and/or the U.S. Commodity Futures Trading Commission ("CFTC"); and/or CBOE Trading Venues, current as of September 25, 2017.
  - b) "Regulatory Purposes" means investigations; regulatory examination; compliance functions; exempting without limitation, regulating rates or CBOE Trading Venues rules; agencies; and regulations with respect to surveillance and regulation; responding to surveillance and regulatory inquiries; and other purposes of surveillance and regulatory organizations.
  - c) "Digital Asset" means a digital asset (also called a "cryptocurrency," "virtual currency," "digital currency," or "digital commodity"), such as bitcoin or ether, which is based on the cryptographic protocol of a computer network that may be (i) centralized or decentralized, (ii) closed or open-source, and (iii) used as a medium of exchange and/or store of value.
2. As set forth below and pursuant to this Agreement, Gemini shall provide information specified in this Agreement, at the times and in the manner specified herein, to the CBOE and/or CBOE Trading Venues, as applicable, relating to Gemini's trading markets and/or auction mechanisms that are the sources of Gemini Trade Prices, Gemini Auction Prices, and/or Gemini Market Data, as defined in the license agreement entered into by and between the Parties and dated as of June 27, 2017 (the "License Agreement"), as well as information related to and/or used in price financial products such as exchange-traded funds that may be listed on CBOE and CBOE Trading Venues by Gemini or its affiliates, including, but not limited to, Digital Asset Services, LLC (collectively, "Gemini Information"). Terms not defined in this Agreement shall have the meaning set forth in the License Agreement. The terms of the License Agreement shall prevail in any conflict between the terms of this Agreement and the License Agreement, except with respect to the sharing of Gemini Information.
3. Gemini shall provide on a daily basis (in a form and within a time period agreed to by the Parties) to CBOE or a CBOE Trading Venue designated by CBOE, the following Gemini Information for Regulatory Purposes:

**Gemini provided all data every day for monitoring**

GEM\_CFTC092970; Dkt. 83-8 at 7-8 (discussing information sharing agreement)

# Gemini Updated Its User Agreement at Cboe's Request



Cameron Winklevoss

**From:** Cameron Winklevoss [cameron@gemini.com]  
**Sent:** 9/13/2017 12:33:35 AM  
**To:** Marrin, Stephanie [marrin@cboe.com]  
**CC:** tyler@gemini.com; michael@gemini.com; Bent, Denise [bent@cboe.com]  
**Subject:** Re: Gemini - CBOE - Marketplace Conduct  
**Attachments:** Gemini - WORKING - Website - User Agreement.docx

Hi Stephanie — thanks for sending this information — it was very helpful! I made updates to our User Agreement (attached), including new 'Marketplace Conduct' and 'Marketplace Conduct Investigations' section. Would love any input or feedback you have.

Best,

Cameron



GEMINI TRUST COMPANY, LLC  
USER AGREEMENT  
(WEBSITE)

CBOECFTC\_00020566

# Gemini Made Auction Changes CFTC Requested



Case 1:22-cv-04563-AKH Document 109-58 Filed 06/07/24 Page 3 of 3

**Cboe** **GEMINI**

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC AND GEMINI TRUST COMPANY, LLC

Cboe Futures Exchange, LLC (CFFE), in conjunction with Gemini Exchange, is proposing three modifications to the Gemini auction process. The combination of changes will address questions raised by CFTC staff and further enhance protections for customers in Cboe Bitcoin Futures.

First, the Gemini Exchange auction collar will be augmented to incorporate an index of bitcoin prices from several bitcoin exchanges. This new bitcoin index will replace the Gemini Exchange continuous order book as the source for the price collar calculation.

The Gemini bitcoin index will be a 10 minute VWAP disseminated via the Gemini API beginning no later than 10 minutes before completion of the auction. The value will also be available through CFE's CSMI data feed. The index value will also be added to the waterfall of possible settlement options in the event the Gemini auction fails.

Additionally, Gemini Exchange will eliminate auction-only market orders. This change eliminates the possibility of large market orders combining to push the auction toward or beyond the auction price collar.

Finally, Gemini Exchange will modify the auction allocation algorithm from time priority to price/time priority. The new allocation algorithm will provide traders with greater flexibility in submitting auction-only offers. That flexibility will strengthen the responsiveness of the auction to market movements. However, it should be noted that this enhancement will only impact the allocation of auction trades. The final auction price and auction quantity will not be affected.

CFFE believes that these changes combine effective market protections with the price discovery benefits inherent in an auction. And we would welcome the opportunity to discuss these changes with the CFTC staff at their earliest convenience.

- Implemented “auction collar”
- Eliminated “auction only” orders
- Introduced price/time priority

**Gemini would have made any reasonable modification Cboe or CFTC requested**





## The CFTC's Knowledge "Case" Is Speculative and Argumentative



- **CFTC has no evidence that Gemini ever thought any statement was misleading**
- **CFTC has no industry or standard of care evidence to support a "should have known" case**

## Only Gemini's Expert Provided Industry Standards Evidence



**Jeremy Cusimano**

*Regulatory Expert*

- Managing Director at Alvarez & Marsal
- Former economic advisor to CFTC Director of Enforcement
- Expert analyst for enforcement actions
- Led team of CFTC experts dedicated to forensic analysis of trading and market events to identify violations of CEA

## Gemini Had No Notice



**Jeremy Cusimano**

*Regulatory Expert*

14. In summary, it is my opinion that **Gemini would not have known or had reason to believe that the CFTC would have considered its actions, policies, or representations to amount to alleged false, misleading, or omitted statements, that were relevant and material to the Core Principle 3** compliance self-certification analysis for the CFE Bitcoin Futures Contract.

## The CFTC Is Trying to Change the Rules



**Jeremy Cusimano**

*Regulatory Expert*

100. ... As described throughout my report, it is my opinion that **Gemini's actions were consistent with common and acceptable market practices** at the time.
  
101. Additionally, as discussed above, **the CFTC had not previously publicly suggested that any of these activities raised concerns with respect to Core Principle 3** compliance. It was not reasonable to expect that Gemini should have known the CFTC would view the alleged false or misleading statements or omissions as being relevant or material to susceptibility to manipulation.



## **Fact Issue: Prefunding (CFTC Category 1)**

## The CFTC's Mistaken Assertions



- 1 Prefunding means no use of borrowed funds**
- 2 Gemini is responsible for the Pearl Street loans**
- 3 Operational advances were undisclosed loans**

**All of the CFTC's assertions are strongly disputed**

## The CFTC Ignores the Court's Guidance



"If it's objective, it's measured by the words themselves."

Dkt. 38 at 6:2-3



"Materiality, misstatements, they are all measured by what the defendant said."

Dkt. 38 at 28:5-9

# The CFTC Was Told What Prefunding Means



Case 1:22-cv-04563-AKH Document 83-8 Filed 07/22/24 Page 3 of 30

Cboe

Statements 1, 5, 9, 13

The Gemini Exchange is a continuously operated, full-reserve exchange that enables customers to buy and sell digital assets, including bitcoin, for fiat currency or digital assets. The Gemini Exchange currently offers trading in bitcoin in U.S. dollars through a continuous order book with four different order types. **As a full reserve exchange, the Gemini Exchange requires all orders to be fully pre-funded with assets on deposit.** **Dollars must be deposited prior to placing a buy order to fully fund that buy order and bitcoin must be deposited before placing a sell order to fully fund that sell order.** All open orders on the Gemini Exchange from a Gemini Exchange market participant reduce that market participant's available balance to submit other orders on the Gemini Exchange until that market participant's pending orders are filled or canceled.

- **These statements are true**
- **No statement about leverage**

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Exhibit E, page 2 of 20

2024063-CFTC-GEMINI-00077445

Dkts: 83-8 at 4; 83-9 at 5; 83-10 at 5; 83-11 at 4

# The CFTC Was Told What Prefunding Means



Case 1:22-cv-04563-AKH Document 131-1 Filed 06/17/24 Page 145 of 148  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY GEMINI FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLP



Statement 19

**Cost of Capital** - All orders must be pre-funded — dollars must be deposited prior to placing a buy order and bitcoin must be deposited before placing a sell order— and participants are not permitted to place an order unless they have enough funds in their account to place such order (orders that are submitted without backing funds are rejected). As a result, no participant's outstanding interest on our books can exceed their account balance at any time and all open orders reduce a participant's available balance until such orders are fulfilled or canceled. Therefore, it is costly for a malicious market participant to engage in manipulative tactics.

- These statements are true
- No statement about leverage

<sup>1</sup> In broad terms, a Dutch auction is a type of simultaneous auction in which each agent declares its demand for the good at every possible price and submits this to an auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied of the good.



# The CFTC's Claim About Prefunding Is Disputed



64. Prefunding was generally understood to mean that Gemini did not offer margin or leveraged trading. (Ex. 1 at 136:12-24, 246:22-247:24, 551:19-553:20 (Winklevoss Dep. Tr.); Ex. 8 at 53:9-25 (Reinstein Tr.); Ex. 9 at 92:21-93:18, 149:8-23 (Goodman Tr.); Ex. 10 at 211:16-212:18, 213:17-214:2, 262:22-263:9 (Kuserk Dep. Tr.); Ex. 21 at 33:14-23 (Pursley Tr.); Ex. 28 at 388:1-6 (11/15-16/2023 R. Toomey Dep. Tr. ("Toomey Tr.")); Ex. 29 at 665:21-666:14 (12/13-14/2023 S. Molidor Dep. Tr. ("Molidor Tr.")); *see also* Ex. 7 at 3.)

**Response:** Disputed. The CFTC has not produced any evidence that there was a "generally understood" meaning of pre-funding. To the contrary, the evidence demonstrates that "pre-funded" is not an industry term of art: the CFTC has never defined it, and "the concept . . . is not found in the text of Appendix C." Ex. 24 [Goodman] at 92:21-93:18. In connection with the self-certification, the CFTC was given specific definitions of what pre-funding meant.

\* \* \*

The evidence the CFTC cites also does not support its statement. While Gemini agrees that it did not provide margin trading, there is no evidence that it ever said that pre-funded meant Gemini customers could not use borrowed funds on the Gemini exchange or that such a rule was "generally understood." The quoted testimony by Cameron Winklevoss says no such thing . . .

## The CFTC's Contradictory Arguments



"Prefunding was generally understood to mean that Gemini did not offer margin or leveraged trading."

Dkt. 98 ¶ 64



"No subjective CFTC evidence is needed to show what message Defendant conveyed when it stated that all orders on the exchange and in the auction were fully prefunded."

Dkt. 123 at 8

## Prefunding Has Nothing to Do With Borrowing



- Prefunding and borrowing are two separate things
- Prefunding transactions with borrowed funds is normal
- The CFTC never said prefunding means no borrowing



# What Prefunding Means in the Real World



amazon Delivering to New York 10012 [Update location](#)

All Medical Care + Groceries + Best Sellers Amazon Basics Prime + New Releases Today's Deals Music Customer Service

Prime Day starts in 08:17:43

**Amazon Fashion** Women Men Kids Luxury Sales & Deals New Arrivals Amazon Brands luxury stores

Waffle Robe, Long, Lightweight Cotton, by BOCA TERRY...

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Size: 5'9"-5'11" (up to 270lbs) ▾

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Fabric type Polyester  
Care instructions Hand Wash Only

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- Judge robes designed with hidden zipper, classic full sleeves, deluxe fluting along the shoulders and yoke, the robe is easy to wash.
- This black judge robe pressed pleated front and back detail, lightweight to allow comfort for the wearer, reinforced stitching throughout the gown.
- Classic judge robe size choose by chest size and height, you can see size guide or contact us for more size.
- Each classic judge robe will give you a comfortable prestigious appearance and fit.

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## Prefunding: The Actual Evidence

## The CFTC Ignores Testimony From Gemini Employees



**Shane Molidor**

*Customer Support Specialist*

- Q. What does “pre-funded” mean?
- A. **My understanding of pre-funding is that this means a Gemini account balance must reflect assets on deposit in order to then buy assets with those assets; so selling your assets to receive another asset and therefore engaging in a trade.**



## The CFTC Ignores Testimony From Gemini Employees



Rose Toomey  
*Lead API Developer*

- Q. What are some other reasons an order could be rejected?
- A. Well, if you don't – **if your account is not pre-funded with the money to cover that order**, so if you have \$50 on deposit and you place an order for \$100, then that entire order \$100 would be rejected.



# The CFTC Ignores Gemini's Internal Polices



Case 1:22-cv-04563-AKH Document 131-1 Filed 07/24/24 Page 86 of 230  
 FOIA CONFIDENTIAL TREATMENT REQUESTED BY COIN FUTURES EXCHANGE, LLC  
 AND GEMINI TRUST COMPANY, LLC



GEMINI TRUST COMPANY, LLC  
 POLICIES AND PROCEDURES MANUAL  
 CONFIDENTIAL

Gemini is a full reserve exchange — funds must be deposited prior to placing any order and all orders must be pre-funded (i.e., Users are not permitted to place an order unless they have enough funds in their account to place such order). As a result, no User's outstanding interest on our Order Books can exceed his or her account balance at any time and all open orders reduce a User's available balance until such orders are fulfilled or canceled. Consequently, all Gemini Inputs, which are Gemini Market Data generated by Matching Engines, are validated by default as directly linked to assets on deposit on our Exchange before they are submitted on a real-time basis to the software components of our Online Platform for compilation and dissemination as Gemini Indices.

**Nothing about borrowed funds**

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER  
 BX258-CFTC-GEMINI-00011904  
 BX258 page 1 of 107

C20430-CFTC-GEMINI-00011904

Dkt. 109-14 at 80

# The CFTC Ignores What Customers Were Told

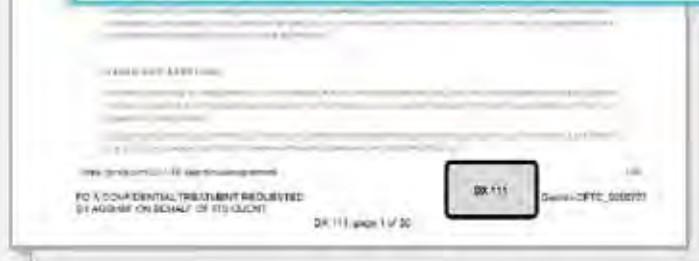


Case 1:22-cv-04563-AKH Document 131-1 Filed 07/24/24 Page 87 of 230

All buy transactions are purchases of Digital Assets with fiat currency that settle immediately from a pre-funded Fiat Account and are recorded on our Exchange Ledger. All sell transactions are sales of Digital Assets for fiat currency that settle immediately from a pre-funded Digital Asset Account and are recorded on our Exchange Ledger. There is no margin trading, options trading, or shorting offered on Gemini at this time.

When you enter a limit Order on Gemini to sell Digital Assets, the full amount of the Digital Assets offered for sale is placed on hold in your associated Digital Asset Account and any associated fees in fiat currency are deducted by Gemini from the sale proceeds. Until the sell Order fills, expires or is canceled, the amount of Digital Assets being offered for sale will not be available to be used for any other purpose, including other sell Orders or withdrawals. For partially filled sell Orders, the unfilled portion of Digital Assets offered for sale will remain on hold until the remaining sell Order is filled, expires or is canceled. ***You agree that it is your responsibility to cancel any sell Order (or part of any sell Order) that you do not want filled.*** If you submit a sell Order and you have the Digital Assets available in your Digital Asset Account, you understand that you may not be able to cancel this sell Order prior to its filling (in whole or in part) and that we will not be liable to you for the completion of an Order after you have submitted a cancellation request. Any limit or market sell Order that exceeds the amount of available Digital Assets in the associated Digital Asset Account will be rejected.

**Nothing about borrowed funds**



Dkt. 109-34 at 7

## The CFTC Ignores What Customers Said



Dan Matuszewski



CIRCLE

- Q. In your experience **did dollars have to be deposited** into Circle's account before Circle could place a buy order?
- A. Yes.
- Q. And, in your experience, **did bitcoin need to be deposited** into Circle's account before Circle could place a sell order on Gemini?
- A. Yes.

# The CFTC Ignores What Customers Said



**CIRCLE**

February 3, 2017

Robert W. Brett  
Deputy Director  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20546-1090

Re: File No. 20-388 (SZA-2016-09) (Private)

Dear Mr. Brett,

We are active participants in the digital currency services built on the Bitcoin protocol. Circle's opportunity to submit a comment on the rule issued by the Winklevoss Bitcoin Trust.

Circle was established in August 2013 and is based in order to offer a suite of services to consumers to benefit in digital commerce. A the Bitcoin blockchain to effect payments in fast way. Bitcoin is a decentralized system of corporation controls.

Since there numerous consumer benefits to Bitcoin – as a global payment rails, but also Bitcoin – as native token and asset – grows exponentially in value. Bitcoin has founded as a fully digital asset that is largely fungible and interchangeable. Hence, miners cannot distinguish which is convertible in more currencies around the globe, giving it its widespread adoption and use. Bitcoin comprises over 90% of the total value of all digital currency. Particularly, in parts of the world where alternative stores of value are harder to access, Bitcoin has held up to its reputation as "digital gold".

While a growing set of U.S.-based institutions and individuals invest in the U.S. via Bitcoin's potential as digital gold, the lack of a conventional access vehicle for the asset class continues to be an obstacle. Institutional investors looking for spot exposure may be restricted from

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Dkt. 109-70 at 3

04.429  
SONY PICTURES

**Circle received Pearl Street loans and operational advances**

Dkt. 109-70 at 3

## The CFTC Ignores Its Own Refusal to Define Prefunding



**Gregory Kuserk**

*Deputy Director –  
Division of Market Oversight*



Q. Based on your experience working at the CFTC over 30 years, **what does pre-funding mean?**

**MR. RODGERS:** So I'm going to object and instruct him not to answer on the basis of the deliberative process privilege.

## The CFTC Ignores Its Own Refusal to Define Prefunding



**Christopher Goodman**  
*Economist*



Q. To your general understanding . . . **What is pre-funding?**

MR. RODGERS: So you can answer to the extent it would not reveal internal preliminary deliberations and opinions and also your own personal opinion.

**THE WITNESS:** Yeah, I guess I would be hesitant to answer that for fear of maybe talking about deliberative process.



# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 83-8 Filed 07/22/24 Page 3 of 30

Cboe

Statement 2, 6, 10, 14

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(iv) **all orders on the Gemini Exchange, including auction-only orders, must be fully pre-funded;**

- **These statements are true**
- **No statement about leverage**

Subject to change at the discretion of the CBOE Board of Directors. A change may become effective at any time or after the Effective Date.  
XBT futures are cash-settled derivative contracts based on the auction price of Bitcoin in U.S. dollars on the Gemini Exchange. XBT futures are designed to reflect economic exposure related to the price of Bitcoin. The final settlement value for XBT futures will be the official auction price (rounded to the nearest penny) for Bitcoin determined at 5:00 p.m. Eastern time on the final settlement day by the Gemini Exchange.

Binance is a digital ecosystem on its decentralized open source protocol of the peer-to-peer Decentralized Finance Network ("Binance Network"). The Binance Network hosts the decentralized public transaction ledger, known as the Blockchain, on which all tokens are recorded. No single entity owns or operates the Binance Network. The infrastructure of the Binance Network is collectively maintained by a decentralized user base. Binance can be used to:

This product and/or service does not constitute or imply a CFTC endorsement of the use of digital currency generally, or Binance specifically.

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22cv04563-CFTC-GEMINI-00077445

Exhibit E, page 2 of 20

Dkts. 83-8 at 9; 83-9 at 9; 83-10 at 9; 83-11 at 8-9



# The CFTC Ignores What Was Actually Said

Case 1:22-cv-04563-AKH Document 100-22 Filed 05/07/24 Page 3 of 3  
 SAC Draft of November 2, 2017  
 CONFIDENTIAL

The Gemini Auction and the CFTC Bitcoin (USD) Futures Contract is Not Susceptible to Manipulation.

## Statement 17

### Pre-funding required for all orders at the auction.

The pre-funding requirement for all orders on the Gemini Exchange (including both generally and with respect to Gemini Exchange auctions) disincentives potentially manipulative behavior.

with other cash bitcoin markets, this helps keep prices in line with broader market levels.

- **The futures contract will drive even more liquidity and competition to the Gemini auction.** The Gemini Exchange auction focuses trading activity to a single moment in time (the time of the auction), which enhances liquidity, market depth, and price discovery at that time. The settlement of an XBT futures contract to the auction result is likely to offer even greater participation and liquidity in the Gemini Exchange auction.
- **Investigation of the Gemini auction and interbank by CFTC and SEC (and all data available to CFTC Market Intelligence office).** In addition to voice structural issues, CFTC will actively screen for potential manipulation of XBT futures, including through the utilization of both XBT futures trading data and Gemini information with regard to the trading of Bitcoin on the Gemini Exchange (which CFTC will receive through an information sharing agreement with Gemini).
- **XBT auction collar:** There is a 3% collar on the auction price prepared by the Gemini Exchange numerous prior trials may prove poor.
- **Closing cross is industry convention/industry standard.** The Gemini Exchange auction mechanism is similar to the “closing cross” auction utilized on large stock exchanges, which is widely accepted methodology for determining the next-day price for an asset. For example, the Nasdaq closing cross auction generates a closing price that is widely used throughout the industry, including Russell Indices, Standard & Poor's and S&P Dow Jones Industrial Average, amongst those usually listed on other exchanges, are eligible for the closing cross system.

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2024-04563-CFTC-GEMI10-00011779

- **These statements are true**
- **No statement about leverage**



# The CFTC Ignores What Was Actually Said

CASE 1:22-CV-04563-AKH Document 83-6 Filed 07/24/24 Page 4 of 9  
 U.S. COURT OF FEDERAL TRIBUNAL FOR FINANCIAL MARKETS, NEW YORK, UNITED STATES OF AMERICA, ET AL.  
 GEMINI TRUST COMPANY, LLC

March 10, 2017 Auction

On March 10, 2017, an order submission caused by large market orders resulted in the Gemini auction price

## Statement 18

While price collars coupled with position limits and surveillance contribute to the soundness of the Gemini auction, **another strength of the auction is Gemini's pre-funding requirement.** The need to maintain a cash balance in support of any order means that funds must be in a trader's account before an order is placed or else the Gemini system will reject the order. To support large trades, firms would need to carry sizable cash deposits at Gemini where they don't earn interest or transfer money into their account in enough time for funds to clear before entering orders.

- **These statements are true**
- **No statement about leverage**

submitted in an extremely volatile bidding session resulted in marketable orders for \$120 billion were cancelled and another \$55 billion became non-marketable due to price improvement.

Meanwhile, the quantity of orders to buy via market orders actually increased due to the drop in indicative prices. The end result of the auction was price improvement of almost 15% (1.87%), which doubled the number of market-only sell orders from 24 to 48, and an increase in the volume executed against marketable market-only orders from 81% to 99%.

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Exhibit 8, page 3 of 8

Civil 16-3-CFTC-GEMINI-00011981

Dkt. 83-6 at 8

# The CFTC Ignores What Was Actually Said



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FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLP



**Time Priority** - We do not permit the cancellation of any auction orders in the final minute leading up to the Gemini Auction Price. Participants can only add to their position, thereby (1) making it costly for them to try to influence the Gemini Auction Price in the last sixty (60) seconds and (2) reducing the opportunity for “spoofing” of the auction order book.

## Statement 20

- These statements are true
- CFTC has no contrary evidence

• **Arbitrage** - A closing call is well understood by Arbitrageurs, making it easy for market participants to profit from the auction. This arbitrage serves to move prices to more competitive segments. Because tokens are fungible, it can be arbitrated across exchanges. This contains the possibility of price manipulation of any one exchange because manipulation of the price on any one venue would require manipulation of the price from all others to be effective – it prevents any costly activity. As a result, price discrepancies across trading venues will be reduced as exchange forces converge prices to within the bounds of arbitrage.

• **Price Discovery** - The Gemini Auction induces trading activity in a single moment. As a result, the quality of the price discovery process is enhanced because of the enhanced liquidity and depth of the market at the instantaneous point in time.

<sup>1</sup> In broad terms, a *Walrasian* (Generalized) auction is a type of simultaneous auction in which each agent announces its demand for the good at every possible price and submits this to an auctioneer. The price is then set so that the total quantity demanded equals the total quantity supplied of the good.

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 109-21 Filed 07/24 Page 6 of 88  
PDA CONFIDENTIAL TREATMENT REQUESTED BY CME FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC



## Statement 22

### 19. Could a trader break the auction by distorting the continuous market?

Because we require the Gemini Auction Price to be within 5% of the midpoint of the continuous trading book, it is possible for a malicious market participant to intentionally attempt to exceed this threshold by manipulating either the Gemini Auction Price itself or the midpoint of the continuous trading book. Such manipulation would likely be very easy to detect since it would be concentrated over a short period of time and involve direct interaction with either the price levels at the inside of the continuous trading book (i.e., the highest bid and lowest offer) or the Gemini Auction Price pricing itself. Furthermore, other market participants are strongly economically motivated to counteract or arbitrage any such occurrence in order to receive fills at their desired prices.

Moreover, **the manipulation of the continuous trading book would likely require substantial capital commitment** and not yield a predictable outcome for the malicious market participant. Because the futures contracts settle to the Gemini Auction Price rather than to the continuous market prices, there is no guarantee that contract settlement would be affected favorably for the malicious participant. In fact, in the event of a failed Gemini Auction, the procedure outlined in Question 12 would determine the settlement price, likely thwarting any attempted manipulation.

Similarly, **because placing orders on the continuous market (and in the Gemini Auction) requires capital to be held (as discussed above), spoofing and other manipulative techniques are typically quite expensive and inefficient as well.**

- **These statements are true**
- **CFTC has no contrary evidence**

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08-027, page 5 of 12

2024 RELEASE UNDER E.O. 14176

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14

## Gemini Auction Mechanics



Statement 26

**As with all Gemini orders, auction orders must be fully (pre-) funded**

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

- These statements are true
- No statement about leverage

CBOT FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOT FUTURES EXCHANGE, LLC

22cv4563-CFTC-GEMINI-0000883

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Exhibit 2, page 8 of 13

Dkt. 83-2 at 7



# The CFTC Ignores What Was Actually Said

Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 4 of 14



Statement 27

## CFE Bitcoin Futures Highlights

- Cash-settled into a liquid, transparent auction

**Prefunding requirements for auction-only orders** allows for heightened surveillance

### Market Regulation

- Arbitrage against other cash bitcoin markets keeps prices in line.
- Liquidity event drives greater participation and offers more transparency
  - Gemini Auction volume is already roughly 2x the average maximum trade size of other bitcoin exchanges
  - Indicative auction prices are shared with the market
- Price collar on the auction and telescoped position limits dis-incentivize manipulative behavior
- Prefunding requirements for auction-only orders allows for heightened surveillance
- Comparable to auctions used to settle other futures contracts
  - VIX Futures – CBOE's SPX SOQ
  - S&P 500 Futures – Primary market SOQ

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

- These statements are true
- CFTC has no contrary evidence

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-0000680

Exhibit 2, page 3 of 13

Dkt. 83-2 at 4

## The CFTC Ignores Market Reality



**Jeremy Cusimano**

*Regulatory Expert*

“Customer borrowing is a **common and accepted practice in financial markets**. Loans do not necessarily reduce the cost of funds.”



**Andy Skrzypacz**

*Auctions Expert*

“These practices of providing advances, trading **incentives, and loans generally encourage participation and liquidity** on an exchange, which, all else equal, reduces susceptibility to manipulation, and are commonly used by exchanges and trading platforms . . .”

# In Reality: Prefunding Helps Prevent Manipulation



Case 1:22-cv-04563-AKH Document 109-21 Filed 07/24/24 Page 6 of 101  
 NYIA CONFIDENTIAL TREATMENT REQUESTED BY CBORP FUTURES EXCHANGE, LLC  
 AND GEMINI TRUST COMPANY, LLC.



## Questions for Gemini

### 4. What are the requirements and responsibilities resulting from Gemini's licensing with the NYSDIFC?

**Regulatory Oversight:** Gemini Trust Company, LLC ("Gemini" or "we") entered directly with the New York State Department of Financial Services (the "NYSDIFC") to obtain a limited purpose trust company license. The term "limited purpose trust company" refers to entities that are chartered under the bank and trust company provisions of the New York Banking Law (NYBL). Under the NYBL, a trust company has general powers available to banks and trust companies, as well as powers generally associated with trustees and other fiduciaries.

Apart from general fiduciary powers and obligations, the following activities are among those specifically identified in the statute as activities that New York trust companies may conduct with respect to their fiduciary accounts, including (i) the power to arrest, imprison exclusively in a fiduciary capacity, to receive and disburse money, to transfer, register and countersign evidences of indebtedness or other securities, and to act as attorney in fact or agent; and (ii) the power to accept appointment as receiver, trustee, or committee of the property of an estate of any person in insolvency or bankruptcy proceedings.<sup>2</sup>

A limited purpose trust company must conduct its business and operations subject to the limitations or restrictions as the NYSDIFC may prescribe in its sole discretion. In practice, most limited purpose trust companies typically engage in activities such as employee benefit trust services, trust services, trust, transfer agency, securities clearance, investment management, and custodial services. A trust company, including a limited purpose trust company like Gemini, can serve as the custodian of customer funds itself.

Under the NYBL, the same general procedures, requirements and criteria for the formation of a banking trust apply also to the formation of a limited purpose trust company, with two exceptions: (i) no requirement to carry FDIC insurance and (ii) a specific capitalization standard satisfactory to the Superintendent of NYSDIFC. Once submitted in acceptable form, a limited purpose trust company application receives the same level of scrutiny as other bank and trust company approvals and ultimately requires the approval of the Superintendent of NYSDIFC. In addition, trust companies are subject to many of the same requirements that apply to a bank.

<sup>2</sup> See N.Y. Banking Law § 100 et seq. (McKinney)  
<sup>3</sup> See

Similarly, because placing orders on the continuous market (and in the Gemini Auction) requires capital to be held (as discussed above), spoofing and other manipulative techniques are typically quite expensive and inefficient as well.

## In Reality: Prefunding Helps Prevent Manipulation



**Andy Skrzypacz**

*Auctions Expert*

Fifth, all orders (on both the continuous order book and auction) were required to be pre-funded,<sup>141</sup> which meant that participants had to commit their own Bitcoin or dollars for the full amount of their orders for the entire time the order was outstanding, regardless of whether the order was executed or not. This increased the cost of placing “fake” orders relative to not having a pre-funding requirement, as I explained in **Section III.C.5. This made it more difficult for market participants to manipulate the continuous order book price through spoofing** (that is, submitting orders outside the current best bid and ask in the continuous order book, to also create a false sense of demand or supply).<sup>142</sup> It also made it more difficult for auction participants to submit orders to affect the indicative price that might create a false sense of demand or supply in the auction.

## The CFTC's Position Is a Litigation Construct



- The CFTC never asked what prefunding meant
- The CFTC never asked about leverage
- The CFTC never told Gemini that prefunding meant no borrowing



## Fact Issue: Pearl Street

# The CFTC Claims Gemini Made the Pearl Street Loans



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff,

22-cv-4563 (AKH)

v.  
GEMINI TRUST COMPANY, LLC,  
Defendant.

Hon/ Alvin K. Hellerstein

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION'S  
MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT

COMMODITY FUTURES TRADING  
COMMISSION  
Division of Enforcement  
290 Broadway, 6th Floor  
New York, NY 10007  
(646) 746-9700

May 7, 2024

**"Pearl Street was a separate company in name only. Gemini facilitated loans to Gemini market participants through Pearl Street."**

**This is false  
(or at least disputed)**

Dkt. 99 at 40

105

# Pearl Street Is Not Gemini



Case 1:22-cv-04563-AKH Document 109-67 Filed 07/24/24 Page 3 of 3

**CERTIFICATE OF FORMATION**  
OF  
**PEARL STREET FINANCIAL, LLC**

State of Delaware  
Date of Incorporation  
Name of Corporation  
Address of Incorporation  
File No. 20160123  
Incorporated in Delaware 09/08/2016

Pursuant to Chapter 18, Section 18-201 of the Delaware Limited Liability Company Act, the undersigned, being authorized to execute and file this Certificate of Formation, hereby certifies as follows:

**FIRST:** The name of the limited liability company is Pearl Street Financial, LLC (the "Company").

**SECOND:** The address of the Company's registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, Delaware 19801. The name of the Company's registered agent at such address is The Corporation Trust Company.

**THIRD:** The Company is formed for the object and purpose of, and the nature of the business to be conducted and promoted by the Company is, engaging in any lawful act or activity for which limited liability companies may be formed under the Delaware Limited Liability Company Act and engaging in any and all activities necessary to incidental to the foregoing.

IN WITNESS WHEREOF, the undersigned shall have caused this Certificate of Formation to be executed this 7th day of January 2016.

By: Jenna Levy  
Name: Jenna Levy  
Title: Authorized Person

- Separate companies
- Separate financial statements
- Separate tax returns
- No parent/subsidiary relationships

**CFTC made no effort to establish  
alter ego liability**

# Pearl Street Is Not Gemini



Document ID: H2C944122-C705637004 Document 107 Filed 08/07/24 Page 1 of 4

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff No. 22-cv-4861 (AKH)

GEMINI TRUST COMPANY

1. TYLER WINKLEVOSS

1. My name is

Company, LLC ("Gemini")  
to the institution for partials  
(CFTC)

1. Gemini Trust Co.

2. Gemini is  
further, Cameron Winklevoss  
was its President

3. We provide  
for individuals and institutions  
dominated by unlicensed  
financial houses

4. To advance this mission, Gemini worked closely with the New York Department of Financial Services ("NYDFS") to obtain a New York limited purpose trust company license.  
Gemini received its trust company license in September 2015 and launched to the public on October 5, 2015.



Tyler Winklevoss

14. I am aware that the CFTC has claimed Pearl Street was created as a tool to get around limitations on Gemini's ability to provide loans to customers. That is wrong.

15. Cameron and I created Pearl Street because we believed there was a demand in the market that we could fill with some of our bitcoin and ether holdings, which were otherwise being HODLed and not generating any interest or other return.

## Pearl Street Made Real Loans



LOAN AGREEMENT



- Governed by written loan agreements
- Real, on-blockchain loans
- Borrowers paid negotiated interest rates
- Interest rates in line with other bitcoin loan rates and higher than benchmarks identified by CFTC's expert
- Only 2 of 35 referenced Gemini

*See, e.g., Dkts. 109-50; 109-51; 124-14, Fig. 2*

## It Is Not True That Pearl Street Loan Recipients Were Required to Trade on Gemini



Cameron Winklevoss  
*President*

**"It was — it was a hope and an expectation. I think there may have been one or two loan documents that outlined an expectation, but the majority of loans did not have that. And I think, as I testified earlier, we didn't really have a way to monitor where the funds were being used. They could have been traded on Gemini, but they could have also been traded on another venue."**





## Lending Is Common In Financial Markets



**Angelo Chan**

*Bitcoin Expert*

Lending is well established in traditional finance



**Jeremy Cusimano**

*Regulatory Expert*

Borrowing does not increase the likelihood of manipulation



**Andy Skrzypacz**

*Auctions Expert*

Whether entities use borrowed assets is irrelevant to any assessment of these firm's trading activity

## Affiliate Lending Is Routine and Noncontroversial



Jeremy Cusimano

Although the Affiliate lender shared owners with Gemini, it was a separate entity. **In traditional finance, for example a large Wall Street bank, there are both lending and trading businesses within the same firm.** A customer could receive funds from the lending business and utilize them for trading.

## Pearl Street Loans Did Not Influence Trading



Dan Matuszewski



CIRCLE

- Q. After entering into the Bitcoin Loan Note included in DX425, did Circle make an active effort to hit this 25 percent target ?
- A. **So our activity didn't change tremendously because we were already doing so much that we basically were, like, just maintain status quo and continue doing it and we should be fine.**

## Lending Does Not Increase the Chance of Manipulation



**Jeremy Cusimano**

*Regulatory Expert*

"Contrary to the CFTC's contentions **unsecured debt does not necessarily make manipulative conduct more likely.**"



**Andy Skrzypacz**

*Auctions Expert*

"These practices of providing advances, trading incentives, and **loans generally encourage participation and liquidity on an exchange, which, all else equal, reduces susceptibility to manipulation**, and are commonly used by exchanges and trading platforms to compete for trading volume..."

Dkts. 124-16 ¶ 51; 124-15 ¶ 100

## Shane Molidor's Testimony Does Not Help the CFTC



**Shane Molidor**

*Customer Support Specialist*



- Q. What was the purpose of the Pearl Street loans?
- A. I can't speak to what the general purpose may have been.

\* \* \*

- A. As I mentioned earlier, my general recollection is that receiving a Pearl Street loan would expand an institutional client's global balance sheet.

Testimony not cited by CFTC

- Q. And how would that benefit Gemini?
- A. I can't speak to how it may have benefited Gemini.

Testimony cited by CFTC

- Q. Did it incentivize the borrower to trade on Gemini?
- A. I can't speak to how a borrower may or may not have been incentivized by receiving a Pearl Street loan.

Testimony not cited by CFTC

Testimony not cited by CFTC



## Operational Advances

## Gemini Explained Operational Advances on Its Website



The image shows a laptop screen displaying the Gemini website. The main headline reads "Instant ACH Deposits Are Here!". Below it, there's a social media sharing bar with icons for Twitter, Facebook, LinkedIn, and Email. A central graphic features three icons: a bank building, a lightning bolt, and a wallet with a dollar sign, connected by arrows. A callout box with a teal border highlights the following points:

- You initiate an Instant ACH deposit.
- Your deposit amount is available for trading *immediately*. You can buy and sell BTC at any point, but you won't be able to withdraw any BTC you buy.
- 4–5 business days later, once your Instant ACH deposit clears, you will be able to withdraw the amount of your deposit and/or any BTC purchased with your deposit.

At the bottom of the laptop screen, a small note says "Arrival; now you can trade and sit back while your funds credit". The laptop model is identified as a "MacBook Pro".

# Gemini Explained How Operational Advances Work



Case 1:22-cv-04563-AKH Document 131-1 Filed 07/24/24 Page 2 of 3

Blog home

PRODUCT ANNOUNCEMENT

Introducing Zero-Confirmation Bitcoin Deposits

LIVE WHERE YOU WORK  
Virtual Engineering

At Gemini, we pride ourselves on helping you move your money fast. Our system lets US-based customers deposit U.S. dollars and trade faster than ever. We've decreased the Bitcoin confirmation times for deposits from six to three. And we continue leading turnaround times for U.S. dollar wire deposits and withdrawals.

Now, we're excited to introduce a new first for digital asset exchange: confirmation pre-credited Bitcoin deposits.

**The Problem with Deposit Delays**

CONFIDENTIAL – SUBJECT TO  
THEFT/COPY CLOSER

DKR 109-39 page 1 of 6

## Zero-Confirmation Bitcoin Deposits

To help ease these deposit delays, we're proud to introduce zero-confirmation pre-credited Bitcoin deposits. Here's how it works: we're running every Bitcoin deposit on Gemini through a proprietary analysis to determine how likely it is to get confirmed, even if the network is clogged with other transactions. If your transaction passes our criteria (which may take a few minutes), ***we'll pre-credit the amount of your deposit and make it available for trading immediately.*** Our tests show that around two out of the three deposits meet the criteria for being pre-credited.

That means that you'll be able to sell BTC for USD or ETH faster and more efficiently. You can also trade in our daily two-sided auction without delay due to Bitcoin network congestion. Then, ***once your deposit eventually reaches its required three confirmations, you'll be able to withdraw the amount of your deposit or any USD or ETH purchased with your deposit.***

## Operational Advances Have a Legitimate Purpose



GEMINI

GEMINI TRUST COMPANY, LLC  
CASH MANAGEMENT  
JUNIOR  
CONFIDENTIAL

"In some cases, for select institutional customers, we may provide an operational advance to bridge an incoming funds transfer if such customer is able to provide proof that the funds are in transit"

GEMINI

GEMINI TRUST COMPANY, LLC  
POLICIES AND PROCEDURES MANUAL  
FUND TRANSFER, LEDGER, AND CUSTODY  
CONFIDENTIAL

"An operational advance for a Wire deposit may be provided to select institutional Gemini Accounts in an effort to bridge an incoming Wire deposit, if the registered User(s) of such a Gemini Account can provide proof that their Wire is in transit"

## Operational Advances Have a Legitimate Purpose



**From:** "John Lindsay" <john@bitwage.com>  
**To:** "Cameron Winklevoss" <cameron@gemini.com>  
**Cc:** "Jonathan Chester" <jonathan@bitwage.com>, "Tyler Winklevoss" <tyler@gemini.com>, cash <cash@institution.gemini.com>  
**Subject:** Re: Line Of Credit For Bitwage?  
**Date:** Thu, 8 Sep 2016 11:08:47 -0700

Hi Cameron,

We just got it credited, thanks a lot!

John

On Thu, Sep 8, 2016 at 10:47 AM, John Lindsay <john@bitwage.com> wrote:

Hi Cameron,

We're waiting on a wire to be deposited, and it has been over 27 hours since it left our bank's accounts. I have a ticket with gemini support, but we have to pause future wires until this is resolved because we don't know if the issue with this wire is on our side or on your side. I called our bank (bbva) and they confirmed it left their accounts, and their website portal confirms it too.

Thanks in advance for any help.

John

On Thu, Sep 8, 2016 at 7:33 AM, Cameron Winklevoss <cameron@gemini.com> wrote:

email Cash @ (cc'd) when you plan to send a wire – include a screenshot and/or some confirmation info from your bank. Once we receive the email and info, we will do an **advanced credit** and will be on the lookout for the actual wire later that same day.

## Providing Advances Is Routine



**Jeremy Cusimano**  
*Regulatory Expert*

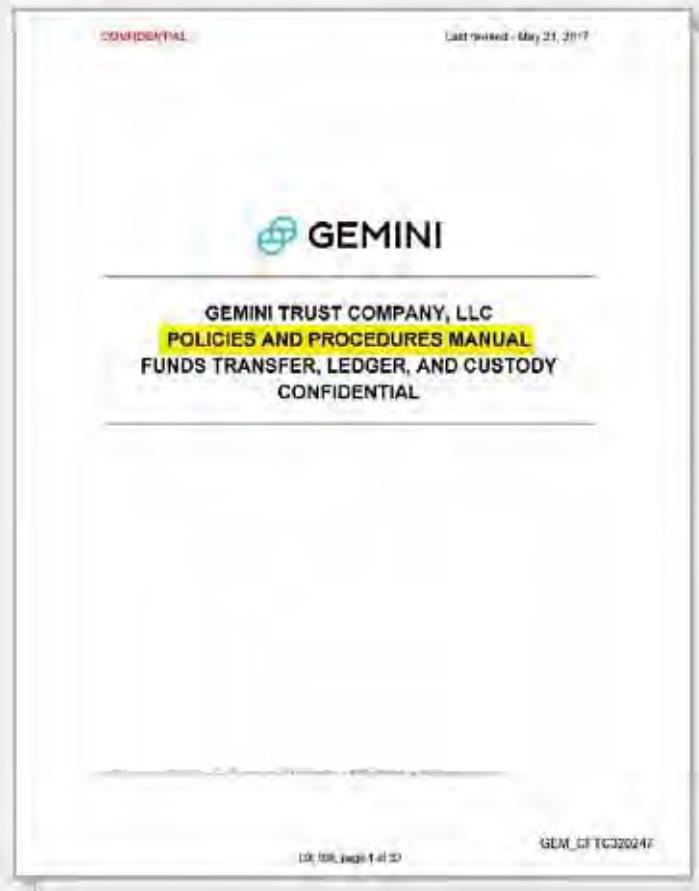
Providing advances to digital asset exchange customer accounts is not unique to Gemini. In fact, other digital asset exchanges also extended similar advances or credit to customers.



**Andy Skrzypacz**  
*Auctions Expert*

I note that in addition to Gemini's operational advances enhancing the liquidity of the exchange, providing advances of funds is a common practice across financial services to reduce frictions related to transfers of funds. For example, banks often make funds from check deposits immediately available for customers. Similarly, banks often provide earlier access to direct deposits for customers.

# Gemini Had Procedures for Operational Advances



## Approval Design — Operational Advances

An operational advance for a Wire deposit may be provided to select institutional Gemini Accounts in an effort to bridge an incoming Wire deposit, if the registered User(s) of such a Gemini Account can provide proof that their Wire is in transit (e.g., wire transfer confirmation, Fedwire reference number, etc.). The time period for an operational advance does not typically exceed twenty four (24) hours. If a Gemini Account is extended an operational advance, that Gemini Account can immediately trade the full value of such advance; however, a withdrawal hold is put on the Gemini Account in an amount equal to or greater than the amount of the operational advance while the funds are in transit, thereby preventing withdrawals in excess of the actual Gemini Account asset balance. When the funds in transit are received and considered settled, the withdrawal hold is removed from the Gemini Account.

The following approval are required for an operational advance of a User's wire deposit:

- An operational advance of a Wire must be approved by one (1) Inbound Wire Approver, which will immediately credit the Wire amount to the User's Fiat Account while the funds are still in transit, and place a withdrawal hold on the User's Gemini Account in an amount equal to or greater than the Wire. Once the Wire has been received, one (1) additional Inbound Wire Approver can release the withdrawal hold placed on the User's Gemini Account.

## Operational Advances Are Not Loans or Lines of Credit



**Marcia Barker**  
*Senior Controller*

- Gemini recorded operational advances as “deposits in transit”
- Confirmed approach with outside consultant and auditor
- Financial statements given to regulators
- NYDFS aware of operational advance policies and procedures



## Operational Advances Are Not Loans or Lines of Credit



**Cameron Winklevoss**  
*President*



Hi Mitchell — to reiterate Shane's email — all outstanding funds should be sent no later than end of business day today. This is not a "credit" line.

Best,

Cameron

On Mon, Apr 17, 2017 at 11:34 AM, Shane Moldor <[shane.moldor@gemini.com](mailto:shane.moldor@gemini.com)> wrote:  
Mitchell,

As previously discussed, any USD pre-credit should be thought of as an operational advance that allows you to trade against prevailing markets on Gemini immediately rather than a "line of credit". We expect any USD operational advance to be paid in full within 24 hours if granted on a business day, and by EOBD of the next business day if granted over the weekend.

Let me know if you have any questions.

Best,  
Shane

## The CFTC Mischaracterizes Testimony About Advances



**Cameron Winklevoss**  
*President*



**Q. And why are you concerned about the characterization?**

**A. Well, for starters, we were a full reserve exchange. So, we don't — we're not permitted to do credit or margin, and so, we need delivery of — actual delivery of the funds.**

**And provided we have that, and we have that evidence, then, we're confident that we're not providing credit or margin.**

## Gemini Followed Its Procedures



Dan Matuszewski



Daniel Kim

★	dan.matuszewski Daniel Matuszewski Hola	9/30/2016 3:11:53 PM(UTC-4)	
★	dan.matuszewski Daniel Matuszewski we have 250K coming in	9/30/2016 3:12:04 PM(UTC-4)	
★	dan.matuszewski Daniel Matuszewski can i get some pre credit love	9/30/2016 3:12:12 PM(UTC-4)	
★	dannykimny Daniel Kim send that screenshot sir	9/30/2016 3:15:45 PM(UTC-4)	
★	dan.matuszewski Daniel Matuszewski SINGLE WIRE - Confirmation Gemini 9.30.16 (1).pdf received. To view it, go to: <a href="https://login.skype.com/login/sso?go=xmmfallback&amp;docid=0-eus-d4-92795a1c610582a2c43063432a22e9a4">https://login.skype.com/login/sso?go=xmmfallback&amp;docid=0-eus-d4-92795a1c610582a2c43063432a22e9a4</a>	9/30/2016 3:16:11 PM(UTC-4)	

Matuszewski\_0002243 at 263

# Advances Facilitated Prefunding



Daniel Kim

## Messages in approvals-credit on 2016-11-10

- DK** danny.kim (Danny Kim) 2016-11-10 03:00 PM  
ZEXJV - \$400,000.00 (XBTOpps) - ADVANCED CREDIT
- DK** danny.kim (Danny Kim) 2016-11-10 03:12 PM  
michael (Michael Breu), Can you approve the Admin Credit of 500BTC for Circle. It's for prefunding,  
<https://blockchain.info/tx/e9eb6c676e17490937ea3125d5d23428a30894c59ce7d89f56a313a32c9e740d>  
View information about a bitcoin transaction  
[e9eb6c676e17490937ea3125d5d23428a30894c59ce7d89f56a313a32c9e740d](https://blockchain.info/tx/e9eb6c676e17490937ea3125d5d23428a30894c59ce7d89f56a313a32c9e740d)  
Bitcoin Transaction e9eb6c676e17490937ea3125d5d23428a30894c59ce7d89f56a313a32c9e740d  
<https://blockchain.info/tx/e9eb6c676e17490937ea3125d5d23428a30894c59ce7d89f56a313a32c9e740d>
- DK** danny.kim (Danny Kim) 2016-11-10 04:02 PM  
michael (Michael Breu) cameron (Cameron Winklevoss) tyler (Tyler Winklevoss) - Please approve the Admin Debit of 500BTC for Circle.

# Advances Facilitated Prefunding



Dan Matuszewski



Daniel Kim

- star dan.matuszewski Daniel Matuszewski 10/3/2016 3:01:54 PM(UTC-4) have a 400K wire coming at ya
- star dannykimmy Daniel Kim 10/3/2016 3:02:49 PM(UTC-4) I guess Mondays are slow, we haven't received it yet
- star dannykimmy Daniel Kim 10/3/2016 3:02:56 PM(UTC-4) can you send a screenshot and I'll prefund
- star dan.matuszewski Daniel Matuszewski 10/3/2016 3:03:41 PM(UTC-4) Getting it from finance for you
- star dan.matuszewski Daniel Matuszewski 10/3/2016 3:03:44 PM(UTC-4) idk if it went out yet
- star dan.matuszewski Daniel Matuszewski 10/3/2016 3:17:54 PM(UTC-4) boom
- star dan.matuszewski Daniel Matuszewski 10/3/2016 3:18:01 PM(UTC-4) SINGLE WIRE - Confirmation Gemini 10.3.16.pdf received. To view it, go to: <https://login.skype.com/login/sso?go=xmmfallback&docid=0-eus-d5-0694792b1448981a5019fdeb526879c7>

# Occasional Mistakes Did Happen



UNITED STATES DISTRICT COURT  
BEFORE THE  
SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading  
Commission

Plaintiff(s) v. Defendant

Case No. 22 CIV. 4563

Gemini Trust Company, LLC

Defendant

EXPERT REPORT OF  
LAWRENCE HARRIS, PH.D.

ON BEHALF OF  
COMMODITY FUTURES TRADING  
COMMISSION

MAY 15, 2024

DK 000, page 1 of 125

**FIGURE 23: SUMMARY STATISTICS CHARACTERIZING OPERATIONAL ADVANCES**

	Count	Earliest Date			Latest Date			Total	Mean	Number of Auction Days Outstanding		
		Extended	Extended	Closed	Min	Mean	Max					
Circle Internet Financial Inc	36	12/15/2016	7/20/2017	10/2/2017	\$43.3	\$1.2	0	8	74			
Cumberland Mining & Materials LLC	2	5/1/2017	7/20/2017	7/21/2017	\$5.4	\$2.7	0	1	1			
XBTQ Trading LLC	4	1/5/2017	3/10/2017	3/13/2017	\$3.5	\$0.9	4	16	49			
Total	42				\$52.2							

**CFTC identifies 42 out of 151,224 advances (0.028%)**

Dkts. 124-19, Fig. 23; 124-15 ¶¶ 57-58

# Occasional Mistakes Were Not Tolerated



Cameron Winklevoss



Marcia Barker

- MB marcia (Marcia Barker) 2017-10-02 11:52 AM  
I\subteam^S521LQPNG]@cameronwinklevossandtylerwinklevoss FYI as part of the quarterly rec that I am working with Eric on, we found an outstanding advanced credit of 750 BTC issued to Circle on 7/20 that was not subsequently debited
- MB marcia (Marcia Barker) 2017-10-02 11:53 AM  
I asked John R. to confirm and resolve today
- cw cameron (Cameron Winklevoss) 2017-10-02 12:07 PM  
Jesus Christ,
- cw cameron (Cameron Winklevoss) 2017-10-02 12:08 PM  
Please make a not of all of these failures — this is gross negligence.
- MB marcia (Marcia Barker) 2017-10-02 12:09 PM  
Will do
- cw cameron (Cameron Winklevoss) 2017-10-02 07:10 PM  
What are the chances that other admin debits / credits are lurking?
- MB marcia (Marcia Barker) 2017-10-02 07:45 PM  
Very likely - I will know more next week after Eric fixes the reporting for this
- MB marcia (Marcia Barker) 2017-10-02 07:46 PM  
With USD we're good because I review the admin debits/credits every month and I am able to pull the report myself
- cw cameron (Cameron Winklevoss) 2017-10-02 08:10 PM  
Cool, I really hope whatever is outstanding is w/ a reputable firm.

# Management Was Not Involved in Occasional Errors





**Shane Molidor**

**AFFIDAVIT OF SHANE MOLIDOR**

STATE OF NEW YORK : )  
COUNTY OF NEW YORK : )  
  
SHANE MOLIDOR, being duly sworn, deposes and says:  
  
1. I make this affidavit based on the facts known to me and my relevant documents.  
2. On January 26, 2016, I began my employment with Gemini Trust Company ("Gemini") as a Customer Support Specialist.  
3. In April December 2016, I had discussions with the responsibilities of Gemini and Gemini's Division of Institutional Sales. I initially began reviewing in detail in around March 2017, when I became Gemini's Client Operations Officer. At that time, I performed my responsibilities with high volume market participant service users from the DTC/USD user tool, the CHT/USD user tool, and the PTHS tool.  
4. I negotiated for arrangements for, among others, Celsius Singapore ("Celsius") and Bitmex, LLC ("Bitmex"), which were standard terms of the service providers.  
  
Dkt. 705, page 1 of 30

17. On several occasions, I arranged for Gemini to extend operational advances to market participants. It was my understanding of company policies and procedures (attached) that market participants were expected to send corresponding funds for these advancements to be delivered to Gemini within approximately 24 hours. I never advised Cameron or Tyler Winklevoss of any situation where operational advances did not comply with company policies and procedures. I was never advised by Cameron or Tyler Winklevoss that it was permissible for operational advances to remain outstanding in a manner that was not consistent with company policies and procedures.

Dkt. 109-47 at 5

131



## **Fact Issue: Bespoke Fees and Rebates (CFTC Category 2)**

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14



## Gemini Auction Mechanics

» Protections

Statement 28

### Market maker trading fee rebates encourage participation

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

- This statement is true
- CFTC has no contrary evidence

CBOT FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOT FUTURES EXCHANGE, LLC

22cv4563-CFTC-GEMNI-0000883

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Exhibit 2, page 8 of 13

Dkt. 83-2 at 7

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 100-21 Filed 03/07/24 Page 6 of 88  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC

GEMINI

Statement 23

**8. Could you please provide more detail on the market makers rebate program? How many market makers are signed up? How much liquidity are they providing to the auctions?**

We have implemented a trading fee program which is available to all of our market participants; **we have no specifically defined market maker program.** In summary, fees are typically charged for liquidity-taking trades, but these fees can be reduced through high trading volumes and maintaining a balance between buy and sell trades; and fees can be charged for liquidity-making trades, but rebates can be earned in a similar way. The details are available at <https://qemini.com/fee-schedule/>. **In a typical month, between 5 and 10 market participants have earned liquidity-making rebates, and these participants typically make up approximately 90% of volume in the auctions.**

- **These statements are true**
- **CFTC has no contrary evidence**

## There Was No Market Maker Program



Cameron Winklevoss  
*President*



- Q. And, specifically, Market Makers, as referenced in this policy, could request special terms under the Preferential Treatment Policy?
- A. **Anybody could. Obviously some of the — I think most of the individuals were liquidity providers or professional traders, and people who make markets and trade through venues throughout the crypto ecosystem.**
- But as I stated before, it was open to anybody.**

## Fees Were Individually Negotiated



Daniel Kim

*Head of Sales*



- Q. Do you know why customers got these different rates?

A. **I believe it was negotiation, from what I can remember.**
- Q. And would it be fair to say that some customers negotiated better deals than others?

A. Yes.
- Q. **Would it be fair to say that there was no specifically designed program for priority users, but that everyone had to negotiate their own deal?**

A. Yes.

# Gemini Provided Its Policy on Bespoke Fee Agreements



To: Goodman, Chris[CGoodman@CFTC.gov]  
 Bcc: Reinstein, Art[Reinstei@cboe.com]; Dickman, Laura[dickman@cboe.com]  
 From: Gordon, Nicole[gordon@cboe.com]  
 Date: Tue 9/12/2017 3:40:30 PM (UTC-04:00)  
 Subject: Gemini Policies and Procedures Manual and Auction Review Process Overview - FOIA CONFIDENTIAL TREATMENT REQUESTED  
 2017-09-12 - Gemini - Policies and Procedures.pdf  
 2017-09-12 - Gemini - CBOE - Auction Review Process - Overview.pdf  
 CFE-Gemini FOIA Letter CFTC Responses (9-12-17).pdf

**To:** Goodman, Chris[CGoodman@CFTC.gov]  
**Cc:** Reinstein, Art[Reinstei@cboe.com]; Dickman, Laura[dickman@cboe.com]  
**From:** Gordon, Nicole[gordon@cboe.com]  
**Sent:** Tue 9/12/2017 3:40:30 PM (UTC-04:00)  
**Subject:** Gemini Policies and Procedures Manual and Auction Review Process Overview - FOIA CONFIDENTIAL TREATMENT REQUESTED  
 2017-09-12 - Gemini - Policies and Procedures.pdf  
 2017-09-12 - Gemini - CBOE - Auction Review Process - Overview.pdf  
 CFE-Gemini FOIA Letter CFTC Responses (9-12-17).pdf

Hi Chris,

As a follow up to what was discussed on the call regarding surveillance in relation to the CFE bitcoin futures contract, attached are two documents from Gemini. The first document is the Gemini Trust Company, LLC's Policies and Procedures Manual. Pages 93-95 cover Gemini's Auction Review Process. Page 95 of this document also contains information related to Gemini's hard fork methodology.

DX 12K

CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER  
 20120, page 1 of 147  
 22w483-CFTC-GEMINI-081702

Dkt. 109-14

# Gemini's Policies and Procedures Disclose Bespoke Fee Agreements



Case 1:22-cv-04563-AKH Document 109-14 Filed 06/07/24 Page 2 of 14  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC AND GEMINI TRUST COMPANY, LLC



GEMINI TRUST COMPANY, LLC  
POLICIES AND PROCEDURES MANUAL  
CONFIDENTIAL

## Agreements Granting Preferential Terms

### Policy

Our Organization may provide certain high volume Users, market makers or other special-case users ("Priority Users") with terms different from those given under the standard User Agreement and fee schedule ("Fee Schedule"). While no specific law covers the granting of Priority User status for a trading platform, we are interested in developing policies and procedures to monitor potential conflicts of interest and compliance with our Organization's interest in fair dealing with Users. We closely monitor arrangements with Priority Users as they relate to:

- The right to receive priority treatment and/or order execution relative to other Users;
- The ability to obtain a more favorable Fee Schedule;
- Liquidity preferences in respect to withdrawals or deposits (e.g., more rapid confirmation of deposit availability or processing of withdrawals);
- Preferential access to Order Book information; and
- The right to submit an order that does not appear in part or in full on the Order Book.

Our Organization will not enter into a Priority User agreement (e.g., "Designated Liquidity Provider" or "DLP") unless such agreements have been reviewed by the CCO.

## Fee Discounts Are Common and Permitted



**Andy Skrzypacz**  
*Auctions Expert*

"While my understanding is that Gemini did not have a structured program to incentivize liquidity providers, **offering different fee arrangements for liquidity providers is a common practice** on other exchanges. For example, the NYSE has several programs that provide incentives for providing liquidity."



**Jeremy Cusimano**  
*Regulatory Expert*

"It is **common in the financial industry for trading incentive programs, including fee rebates, to be offered to market participants**. To my knowledge, there is no regulatory prohibition on having a trading incentive program, nor on tailoring features of that program to create bespoke arrangements for certain customers."

## Gemini Could Not Have Known Bespoke Fee Agreements Were Material



**Jeremy Cusimano**

*Regulatory Expert*

69. Gemini would not reasonably have known that the CFTC would view information about bespoke fee arrangements as relevant and material to Core Principle 3 compliance. Trading incentive programs, which may include fee rebates and bespoke fee arrangements, are commonplace and provide key liquidity to markets.<sup>75</sup> Additionally, in my experience, these trading incentive programs are not uniformly applied to every market participant. **To my knowledge, the CFTC has not provided a public position that trading incentive programs, including fee rebates and bespoke fee arrangements, increase susceptibility to manipulation.** In fact, many CFTC-regulated exchanges offer such trading incentive programs. The CFTC lacks rationale for its assumption that Gemini's trading incentive program is substantially different or less appropriate than those deemed acceptable to the CFTC which are offered by other exchanges.



# The Hashtech-Cardano Fraud

## The Hashtech-Cardano Fraud



- Coordinated trading by two Gemini customers
- Objective was to obtain rebates, not to affect prices
- Traded exclusively on continuous order books

## Gemini Was *the Victim of the Fraud*



- Nothing required disclosure, but **Gemini did disclose to regulators**
- Fraud had **nothing to do with auction**
- Fraud had **nothing to do with “Cboe Bitcoin futures” product**
- The **CFTC took no action** against anyone involved in the fraud

## Hashtech and Cardano Never Traded in the Auction



**Rose Toomey**  
*Lead API Developer*



**Andy Skrzypacz**  
*Auctions Expert*

- Q. Did Hashtech and Cardano ever trade with each other through the Gemini auction?
- A. **I can't remember that happening.**

"The Gemini auction **data show that neither Hashtech nor Cardano ever participated** in the Gemini auction."

## Hashtech and Cardano Did Not Affect Prices



**Andy Skrzypacz**

*Auctions Expert*

**"[T]here is **no evidence** that Hashtech or Cardano's wash trading activity affected the Gemini auction prices."**

**"Based on my analysis, it is also clear that the manner in which Hashtech and Cardano coordinated their trades **did not affect prices** on the Gemini continuous order book."**

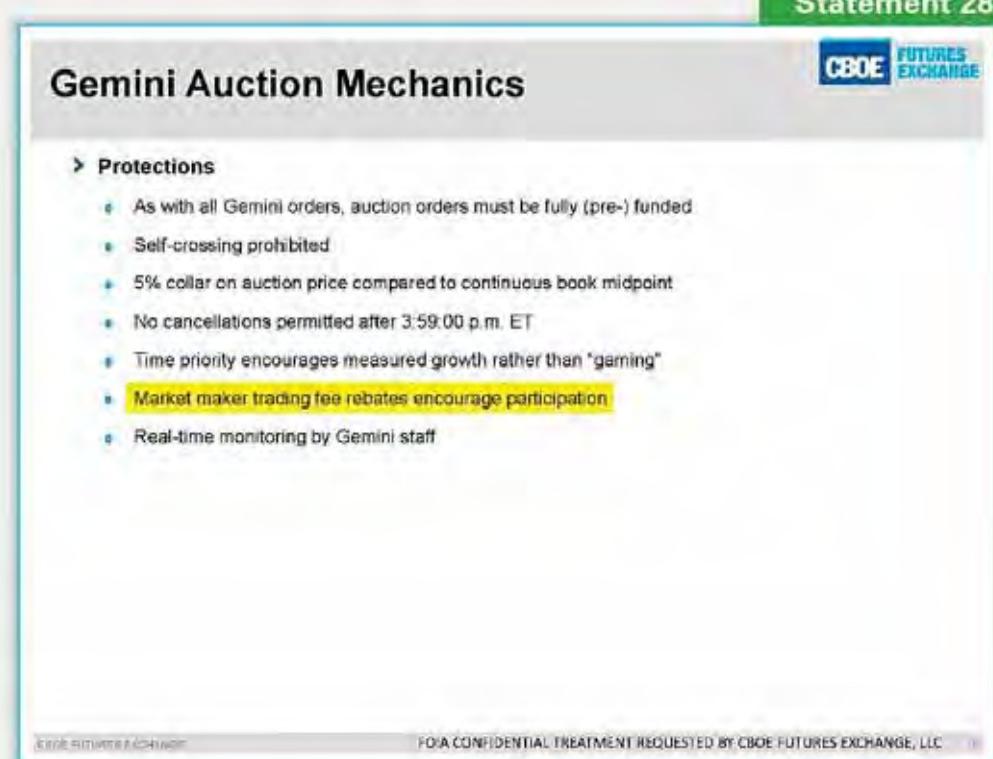
# The CFTC Ignores the Timeline



Statement 28



July 25



**Gemini Auction Mechanics**

**CBOE FUTURES EXCHANGE**

➤ **Protections**

- As with all Gemini orders, auction orders must be fully (pre-) funded
- Self-crossing prohibited
- 5% collar on auction price compared to continuous book midpoint
- No cancellations permitted after 3:59:00 p.m. ET
- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

Dkt. 109-71 at 6

## The CFTC Ignores the Timeline



Dkt. 109-73 at 5

# The CFTC Ignores the Timeline



Statement 23

**8. Could you please provide more detail on the market makers rebate program? How many market makers are signed up? How much liquidity are they providing to the auctions?**

We have implemented a trading fee program which is available to all of our market participants; we have **no specifically defined market program**. In summary, fees are typically charged for liquidity-taking trades, but these fees can be reduced through high trading volumes and maintaining a balance between buy and sell trades; and fees can be charged for liquidity-making trades, but rebates can be earned in a similar way. The details are available at <https://gemini.com/fee-schedule/>. In a typical month, between 5 and 10 market participants have earned liquidity-making rebates, and these participant typically make up approximately 90% of volume in the auctions.

Statement 28

Cameron Winklevoss  
learns of losses

July 25

August 23

August 25

Dkt. 109-21 at 10

## The CFTC Ignores the Timeline



**rose (Rose Toomey)** 2017-10-09 03:34 PM

i tried a bunch of different approaches but i think this was the most valuable

**rose (Rose Toomey)** 2017-10-09 03:34 PM

1/ they only make to each other

rose (Rose Toomey) 2017-10-09 03:35 PM

2/ the notional value is concentrated in relatively few trades

**rose (Rose Toomey)** 2017-10-09 03:35 PM

conclusion, either they rigged it themselves or had assistance from the inside

cameron (Cameron Winklevoss) 2017-10-09 06:15 PM

This is great work Rose — thanks for sharing.

**No at-issue statements about fees after Gemini discovered it was defrauded**

## **Statement 28**

## Cameron Wi [redacted] learns of losses

**Statement 23**

July 25

August 23

August 25

October 9

Dkt. 113-11 at 2

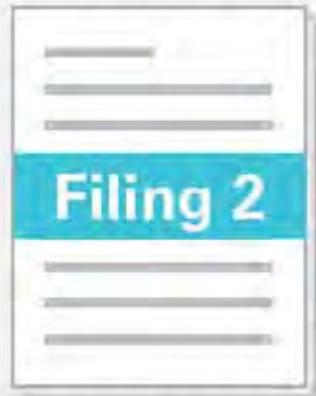
151

## The CFTC Ignores the Timeline



October 9

**Disclosure to state authorities**



October 19

**Disclosure to federal authorities**

Dkts. 109-89; 113-05



## **Fact Issue: Self-Crossing (CFTC Category 3)**

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 03-6 Filed 07/22/24 Page 1 of 30

Cboe

Statements 4, 8, 12, 16

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(v) self-crossing is prohibited on the Gemini Exchange;

Diligentus, and CFTC Policy and Procedure XMT (“Minimum Trade Premium”), a chart that summarizes the Product specifications in this section. The terms and conditions for XMT rates and the Auctioneer will become effective on December 1, 2017 (“Effective Date”) XMT rates will be listed for trading on CFTC on a date to be announced by the Exchange through the issuance of a circular publication or after the Effective Date.

XMT Rates are cash-settled futures contracts that are based on the auction price of Bitcoin in U.S. dollars on the Gemini Exchange. XMT Rates are designed to reflect economic exposure related to the price of Bitcoin. The final settlement value for XMT Rates is set for the official auction price recorded in the second party fair volume determined at 4:00 pm Eastern time on the final settlement date by the Gemini Exchange.

Biswap is a digital asset based on the decentralized open source protocol of the peer-to-peer Bitcoin payment network (‘Bitcoin Network’). The Biswap Network runs the decentralized public transaction ledger, known as the Blockchain, on which all Biswap is recorded. No single entity owns or operates the Biswap Network. The Biswap Network is collectively maintained by a distributed user base. Biswap can be used to

This product certification does not constitute or imply a CFTC endorsement of the use of digital currency generally, or Biswap specifically.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

22cv0363-CFTC-GEMINI0001745

Exhibit 8, page 2 of 26

- This statement was true

Dkts. 83-08 at 9; 83-09 at 9; 83-10 at 9-10; 83-11 at 8-9

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 100-6 Filed 05/07/24 Page 1 of 2  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND COMMERCIAL TRUST COMPANY, LLC



**Self-Trade Prevention - We prohibit the same market participant from crossing with himself or herself (either intentionally or unintentionally) on a continuous trading order book or in a Gemini Auction.**

Statement 21

- This statement was true

exchanges throughout Europe and Asia. In addition, a closing cross is widely accepted as the end-of-day "price" of a given asset. Even if a significant amount of trading volume occurs on multiple venues.

**Gemini Auction** - We believe the Gemini Auction has a number of attributes that promote the integrity of the auction price and discourage manipulative conduct.

- **Arbitrage** - A closing cross is well understood by arbitragers, making it easy for market participants to interact with the auction. This arbitrage serves to cause prices to move into proper alignment. Because bitcoin is fungible, it can be arbitrated across exchanges. This constrains the possibility of price manipulation on any one exchange because manipulation of the price on any one venue would require manipulation of the global price of bitcoin to be effective—a prohibitively costly activity. As a result, price discrepancies across trading venues will be reduced as arbitrage forces convergence prices to within the bounds of arbitrage.
- **Price Discovery** - The Gemini Auction focuses trading activity to a single moment. As a result, the quality of the price discovery process is enhanced because of the enhanced liquidity and depth of the market at the concentrated point in time.

<sup>1</sup>In broad terms, a Vickrey auction is a type of simultaneous auction in which each agent submits its demand for the good at every possible price and submits this to the auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied at the good.

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 100-21 Filed 03/07/24 Page 6 of 68  
 FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
 AND GEMINI TRUST COMPANY, LLC



## Statement 24

**10. Could an auction occur where there is one participant trading with themselves?**

**No, we have instituted self-trade prevention.**

- **This statement was true**

NYBL<sup>57</sup>. Under the NYBL, a "trust company" has general powers available to banks and trust companies, as well as powers generally associated with trustees and other fiduciaries.

Apart from general fiduciary powers and obligations, the following activities are among those specifically identified in the statute as activities that New York trust companies may conduct with respect to their fiduciary accounts, including: (i) the power to accept deposits exclusively in a fiduciary capacity, to receive and disburse money, to transfer, regular and countersign evidences of indebtedness or other securities; and to act as attorney in fact or agent and (ii) the power to accept appointment as receiver, trustee, or committee of the property of an estate or any person in insolvency or bankruptcy proceedings.<sup>58</sup>

A limited purpose trust company must conduct its business and operations subject to the limitations or restrictions set forth in NYDFS, may prosecute in its sole discretion. In practice, most limited purpose trust companies typically engage in activities such as employee benefit trust, personal trust, corporate trust, transfer agency, securities clearance, investment management, and custodial services. A trust company, including a limited purpose trust company like Gemini, can serve as the custodian of customer funds asset.

Under the NYBL, the same general procedures, requirements and criteria for the formation of a full-service bank apply also to the formation of a limited purpose trust company with two exceptions: (i) no requirement to carry FDIC insurance and (ii) a level of capitalization deemed satisfactory by the Superintendent of NYDFS. Once submitted in acceptable form, a limited purpose trust company application receives the same kind of scrutiny as other bank and trust company proposals and ultimately requires the approval of the Superintendent of NYDFS. In addition, trust companies are subject to many of the same requirements that apply to a bank.

<sup>57</sup> See N.Y. Banking Law § 100 et seq. (McKinney).

<sup>58</sup> id.

# The CFTC Ignores What Was Actually Said



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14

## Gemini Auction Mechanics



Statement 31

» Protections

### Self-crossing prohibited

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

• This statement was true

CBOT FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOT FUTURES EXCHANGE, LLC

22cv4563-CFTC-GEMNI-0000883

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Exhibit 2, page 8 of 13

Dkt. 83-2 at 7

## It Is Undisputed That Gemini Did Ban Self-Crossing



Gemini Continuous Order Book



Self-crossing banned in **March 2017**

Gemini Auction



Self-crossing banned in **May 2017**

# Gemini Answered Questions About the Ban



Rose Toomey

Lead API Developer

**From:** "Rose Toomey" <rose@gemini.com>  
**To:** "O'Callahan, Dennis" <ocallahd@cboe.com>  
**Cc:** "Noah Cornwell" <noah.cornwell@gemini.com>, "Sarah Olsen" <sarah.olsen@gemini.com>  
**Subject:** Re: Questions that have arisen  
**Date:** Mon, 11 Sep 2017 21:51:02 +0000

Hi Dennis,

1. The code that prohibited auction book selfcross was released on 23 May 2017.
2. Beginning at ten minutes before 16:00, a number of "simulated" auctions run to supply indicative prices. Those events supply a provisional success or failure depending on whether the price is within the +/- 5 pct collar. When the final, "real" auction runs at 16:00, once the auction price is established we determine at that time if it's within the collar. If it is, we proceed with filling the orders and publish a successful result. If it's outside that collar, nothing is filled, and we publish a failure.
3. Nobody earns any interest on Bitcoin holdings at Gemini. Users do not explicitly have funds "in" one wallet or the other. Account balances allow users access to funds from a co-mingled hot wallet.
4. I'm cc'ing Sarah Olsen, our head of business, to provide further details about block trading.

Best,  
Rose

## Gemini's Data Disclosed Pre-Ban Self-Crossing



**Data given to CFTC included instances of self-crossing**

## What Is “Folding”?

### Continuous Order Book



Matching  
Algorithm

### Auction Orders



Bulk trade

### Auction Sale



# Folding Is Not Self-Crossing



Rose Toomey

Lead API Developer



## slack September 3, 2017

CW

cameron (Cameron Winklevoss) 2017-09-03 08:00 PM

we have self trade prevention in both auctions and continuous trading?

\* \* \*

RT

rose (Rose Toomey) 2017-09-03 08:02 PM

yes, we have both: if a participant submits an order that could cross a standing order on the continuous book or the auction book, then the incoming order will be cancelled

CW

cameron (Cameron Winklevoss) 2017-09-03 08:02 PM

so is the statement above accurate?

RT

rose (Rose Toomey) 2017-09-03 08:03 PM

where we do not attempt "self trade" prevention is where the auction book and the continuous book are folded together during the auction: because the auction fill is regarded as a bulk trade, it would be possible for a market maker to be on "both sides" but the auction volume is comingled so we do not regard it as a self trade

RT

rose (Rose Toomey) 2017-09-03 08:03 PM

yes, the quoted statement is accurate

# Folding Is Not Self-Crossing



**Rose Toomey**

*Lead API Developer*

## slack February 22, 2017

**Rose Toomey** 2017-02-22 06:00 PM  
not really

**Rose Toomey** 2017-02-22 06:00 PM  
first off, it is really difficult/impossible to predict at the time an order is placed whether you will be  
"trading with yourself"

**Rose Toomey** 2017-02-22 06:00 PM  
second, you are not "trading with yourself", you're participating in a mass buy/sell event



# Gemini Told Cboe About Folding



GEMINI TRUST COMPANY, LLC  
DIGITAL ASSET SERVICES, LLC  
DCM DUE DILIGENCE FOR BITCOIN (USD) F

## *Gemini Exchange Auction*

In addition to the continuous trading order book, our BTC/USD order matching engine conducts an Auction (or "cross") at 4:00 p.m. Eastern Time (i.e. 21:00 UTC during the winter and 20:00 UTC during the summer in New York) every day. This provides an opportunity for both buyers and sellers to trade in an instant of elevated liquidity and price discovery. All active orders (including resting vanilla limit and MOC limit orders) may interact with the Auction and influence the final auction price ("Auction Price"), which is determined by finding the price at which the greatest aggregate buy demand and sell demand are fulfilled. All participating, eligible orders are fulfilled at the Auction Price. (We use a mechanism similar to Arca, Nasdaq, Bats, and other large stock exchanges throughout Europe and Asia, which is sometimes called Walrasian equilibrium.)

# Gemini Told Cboe About Folding



**Cboe**

From: "O'Callahan, Dennis" <dennis@.cboe.com>  
To: "Rose Toomey" <rose@gemini.com>  
Cc: "Mollet, Michael" <mollet@cboe.com>; "Silva, Tiago" <tiago@cboe.com>; "Yann Chouinard" <yann.chouinard@cboe.com>  
Subject: Re: Self Trade Prevention on the Gemini Exchange  
Date: Mon, 27 Nov 2017 14:38:57 -0500  
Message-ID: <20171127143857.10000-1@mx1.cboe.com>

**Cboe**

From: Rose Toomey [mailto:[rose@gemini.com](mailto:rose@gemini.com)]  
Sent: Monday, November 27, 2017 3:59 PM  
To: O'Callahan, Dennis <[dcallahan@cboe.com](mailto:dcallahan@cboe.com)>  
Cc: Mollet, Michael <[mollet@cboe.com](mailto:mollet@cboe.com)>; Silva, Tiago <[tiago@cboe.com](mailto:tiago@cboe.com)>  
Subject: Re: Self Trade Preventions on the Gemini Exchange

Hi Dennis,

Gemini has self-trade protection within the continuous order book and the auction order book.

However, we don't at present prevent the possibility that a single account might participate in both sides of the auction, one side from the continuous book and the other side from the auction-only book. We've been discussing this very topic recently:

1. it's a logistic challenge to determine how to exclude self-trades only at the time the auction algorithm runs, and
2. we're unclear what the usual and customary auction/continuous order book self-trade prevention strategy would be

GDAX prohibit self-trade:  
<https://docs.gdax.com/#self-trade-prevention>

Can't find anything on whether ItBit or Bitstamp prohibit self trade.

I figured as much: fifty percent truncation of the data is really throwing out the baby with the bathwater. I'd prefer to see if a longer time period might be made to work with ten percent truncation.

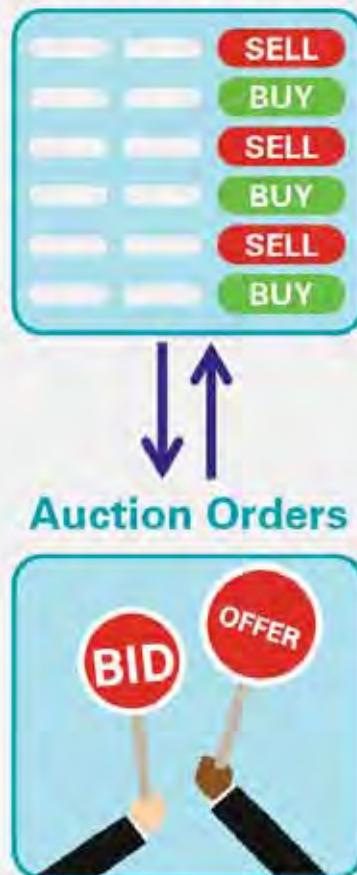
Best,  
 Rose

Dkt. 109-52 at 3

## The Actual Facts: Folding Is Rare and Had No Impact



### Continuous Order Book



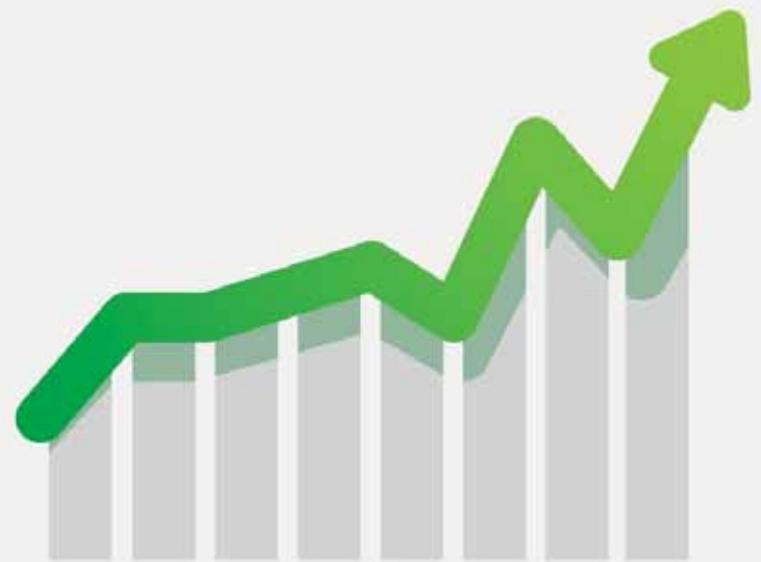
- 16 out of 12,098 (0.132%) auction trades after July 24, 2017
- The 16 trades involved 8 different customers
- No evidence anyone did it deliberately
- No evidence of any impact on auction

Dkts. 124-19 at 24 (Fig. 6, Gemini Trade Data); see also 124-15 at 113 n.266



## **Fact Issue: Volume (CFTC Category 4)**

## Every Business Wants to Increase Volume



# Using Incentives to Increase Volume (“Liquidity”) Is Common

UNITED STATES DISTRICT COURT  
BEFORE THE  
**SOUTHERN DISTRICT OF NEW YORK**

Commodity Futures Trading  
Commission  
Plaintiff(s)  
v.  
Gemini Trust Company, LLC  
Defendant

Case No. 22 Civ. 4563

EXPERT REPORT OF  
**LAWRENCE HARRIS, PH.D.**

ON BEHALF OF  
**COMMODITY FUTURES TRADING  
COMMISSION**

MAY 18, 2014

DK 800

DK 800

DK 800 page 1 of 125

31. Exchanges often try to attract traders by offering rebates, reduced fees, and other economic incentives to traders who trade on their platforms. Traders who offer to trade attract other traders who want to trade, increasing the utility of the exchange to traders. The more traders an exchange has, the more useful it is to traders, and obviously, the more valuable it is to the exchange's owners.

Dkt. 124-19 ¶ 31

## Gemini's Volume Data Was Real



Rose Toomey

*Lead API Developer*

- Q. Did you ever provide **any false data** to Cboe?  
A. No.
- Q. Did you ever provide **any misleading data** to Cboe?  
A. No.



## All Data Provided Were Accurate



### Statement 30

Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 5 of 14

#### Gemini Auction



CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

- The CFTC has no evidence these data were wrong

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-00008af

Exhibit 2, page 4 of 13

Dkt. 83-3 at 4

# All Data Provided Were Accurate



To: Leahy, Thomas M. [tleahy@CFTC.gov]  
 Cc: Reinstein, Art [Reinstei@cboe.com]  
 From: Gordon, Nicole [gordon@cboe.com]  
 Sent: Tues 8/1/2017 5:25:34 PM (UTC-4:00)  
 Subject: CFTC Data Request Response - CFE FOIA CONFIDENTIAL TREATMENT REQUESTED  
 CFE FOIA Request Information and Email Dated August 1 2017.pdf

From:

**To:** Leahy, Thomas M., Jr. [tleahy@CFTC.gov]  
**Cc:** Reinstein, Art [Reinstei@cboe.com]  
**From:** Gordon, Nicole [gordon@cboe.com]  
**Sent:** Tues 8/1/2017 5:25:34 PM (UTC-4:00)  
**Subject:** CFTC Data Request Response – CFE FOIA CONFIDENTIAL TREATMENT REQUESTED  
CFE FOIA Request Information and Email Dated August 1 2017.pdf

Tom,

I am sending overnight for delivery tomorrow via FedEx a package with a CD-ROM containing the raw data used to create the graphs and charts in the Appendix of the cash-settled (USD) bitcoin futures product presentation that occurred on July 25, 2017. I am also attaching a letter requesting FOIA confidential treatment of this email and the information contained on the CD-ROM.

Please let me know if you do not receive the package tomorrow and also if you have any questions or would like further information.

Thanks,  
 Nicole

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER  
 Exhibit 4, page 1 of 2

2024563/CFTC-GEMINI 00017360

## Statement 25

- The CFTC has no evidence these data were wrong

Dkt. 83-4

# All Data Provided Were Accurate



Case 1:22-cv-04563-AKH Document 03-6 Filed 07/22/24 Page 1 of 30

Cboe

Statement 3, 7, 11, 15

Data from [data.bitcoinity.org](http://data.bitcoinity.org) reflects that as of August 28, 2017 the 20-day moving average of the Gemini Exchange's market share in exchange trading in bitcoin in U.S. dollars was 12.8% and that the 20-day moving average of the Gemini Exchange's trading volume in bitcoin in U.S. dollars was 11,310 bitcoin. As of August 28, 2017, 553 market participants have traded at least once in a Gemini Exchange auction for bitcoin in U.S. dollars. **The 20-day moving average of dollar trading value in Gemini Exchange auctions for bitcoin in U.S. dollars as of August 28, 2017 was \$1,739,000.**

particular computer network ("Bitcoin Network"). The Bitcoin Network hosts the decentralized public transaction ledger, known as the Blockchain, on which all Bitcoin is recorded. No single entity owns or operates the Bitcoin Network. The infrastructure of the Bitcoin Network is collectively maintained by a decentralized user base. Bitcoin can be used to purchase goods and services.

This product certification does not constitute or imply a CFTC endorsement of the use of digital currency generally, or Bitcoin specifically.

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Exhibit 8, page 2 of 26

22cv0363-CFTC-GEMINI-0001745

- **The CFTC has no evidence these data were wrong**

## The CFTC Never Said Certain Trades “Don’t Count”



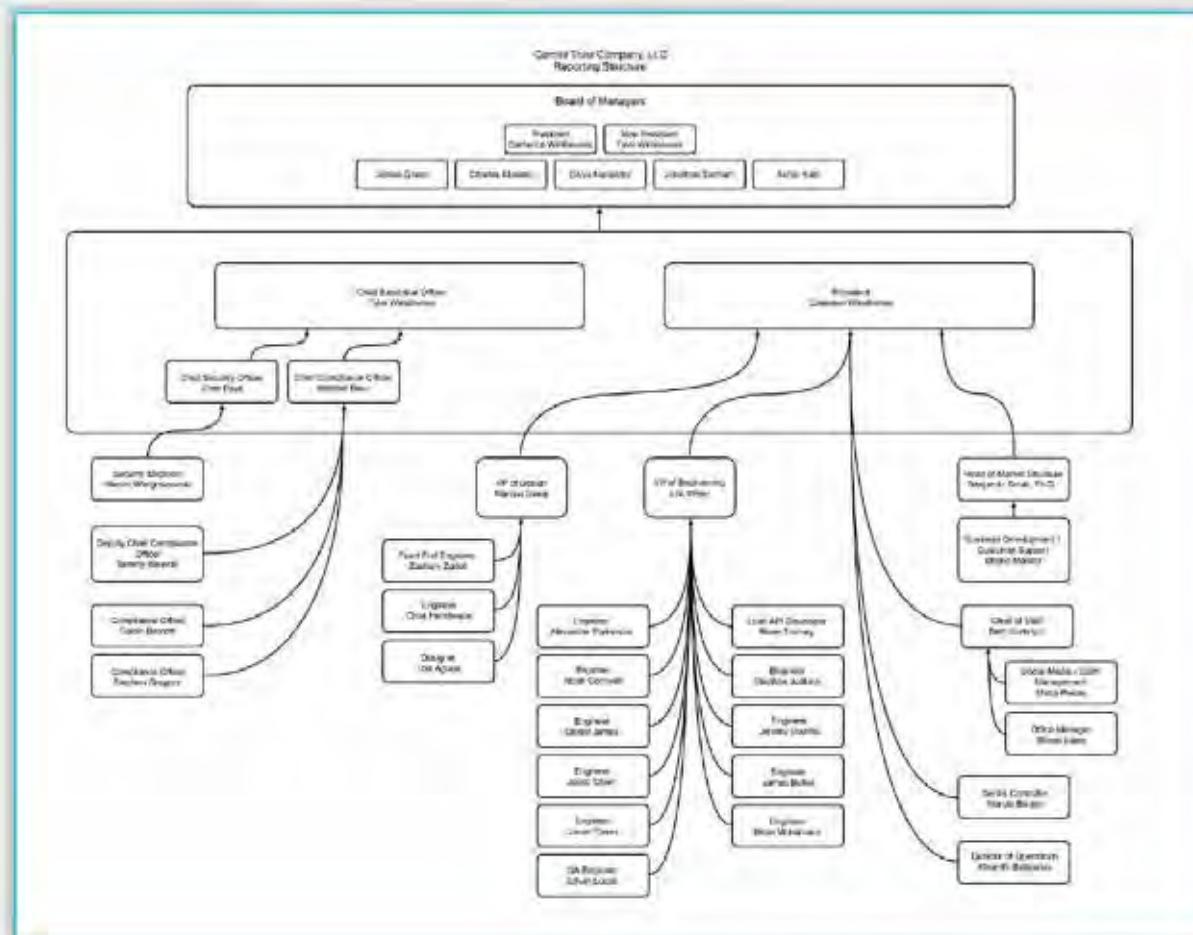
- Appendix C says nothing relevant
- The CFTC never provided any alternate guidance





## Additional Reference Material

## The Gemini Org Chart in 2017



*See* Dkt. 100-3

## The Pearl Street Loans Were Not Below Market



**Joshua Lim**  
OTC Trading Desk



**From:** Joshua Lim <jlim@circle.com> on behalf of Joshua Lim <jlim@circle.com>  
**Sent:** Tuesday, December 20, 2016 2:33 PM  
**To:** Shane Molidor <Shane Molidor <Shane.molidor@gemini.com>>  
**Subject:** Fwd: BTC borrow on Gemini  
**Attach:** 2016-09-20-PearlStreet-Circle-Note-BITCOIN.pdf

This is an example of an old one.

We had been at 4%, which is why we stopped using it. Would be great to get the 1.5%

**The Pearl Street loans were set  
by market forces**

# Gemini Provided Complete Documents



**From:** Benjamin Small [benjamin.small@gemini.com]  
**Attn:** 6/20/2017 9:20:30 AM  
**To:** Mollet, Michael [mollet@cboe.com]  
**CC:** Tyler Winklevoss [tyler@gemini.com]; Cameron Winklevoss [cameron@gemini.com]  
**Subject:** Re: FW: CFE Bitcoin Futures

Hi, Michael. We're wading through these questions now. I think some, especially regarding OCC settlement procedures, are in our section rather than yours; please feel free to compose answers to those. We'll try to send you a final or final-ish draft tonight or tomorrow morning before your noon (EDT) meeting.

I think it's in our best interest to load this up with our full policy and procedures manuals as exhibits. In part so that can see the full text for themselves, and in part to impress them with how much written supervisory procedures Gemini has built over the years. We also intend to incorporate our policies pursuant to IOSCO Financial Benchmark Principle 14—I hope that gives them some confidence as well.

Thanks.

BEST,  
On Fri, Aug 18, 2017 at 11:05 PM, Michael Mollet <[mollet@cboe.com](mailto:mollet@cboe.com)>  
Other messages from the CFE

Michael Mollet (Director of Product Development)

(CBOE FTX)

14 Wall Street, 12th Floor, New York, NY 10005

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LinkedIn

Facebook

Learn more about the CBOE and its organization [www.cboe.com](http://www.cboe.com)

From: Gemini, Oliver Lammie-Goldberg, CFTC  
Sent: Friday, August 18, 2017 11:43 AM  
To: Mollet, Michael [mollet@cboe.com]  
Subject: RE: CFE Bitcoin Futures

Thanks.

On the page 1 of 1



Benjamin Small

# Rule 10b-5



It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

# Bitcoin Loans Are Public



	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
1																
2																
3	Entity	Account ID	Value (USD)	BTC	Duration	Interest	Loan Start	Maturity	Interest	Loan Start	Maturity	Interest	Loan Start	Maturity	Interest	
4	XBT OPPS - LOAN															Bitcoin Address
5	XBT Opps, LLC	10079	\$2,700,000	1000	180	1.5%	2017-01-05	2017-05-31	6.98630136966301	2017-06-01	2017-10-01	5.01369663	2017-10-02	2017-12-27	3.534245575	3Am8DqrGfEv3hUm3f5wBFmebeAJ22Wdwn
6			\$2,700,000	1000	180	1.5%	2017-01-05	2017-05-31	6.82191780821918	2017-06-01	2017-10-01	5.01369663	2017-10-02	2017-12-27	3.534245575	
7			\$2,700,000	1000	180	1.5%	2017-01-05	2017-05-31	4.06849315068493	2017-06-01	2017-10-01	5.01369663	2017-10-02	2017-12-31	3.668640137	
8	Total								17.87671232876710			15.04109589			10.7612329	
9	B2C2 - LOAN															
10	B2C2 Ltd.	1595	\$1,620,000	600	180	4.0%	2017-01-01	2017-06-30	11.83561643835620	2017-06-30	2017-10-02	6.180821918	2017-10-03	2017-12-28	5.654244521	3LiaVkhYtpKZVyMvjnPcoY3Rfa31q57owl
11	CIRCLE - LOAN															
12	Circle Financial, Inc.	8972	\$2,700,000	1000	180	1.5%	2016-12-21	2017-05-31	7.43835616438356	X	X	X	X	X	X	1LubasDyxltUVi8Byg1RpxEHVXsqBqPr2SN
13			\$5,400,000	2000	180	1.5%	2017-01-01	2017-05-31	13.97260273972600	2017-06-01	2017-09-01	11.34246575	X	X	X	
14	Total								21.41095890410960			11.34246575	X	X	X	
15																
16	TOTAL															
17																
18																
19																
20																
21																
22	Interest rate / annum															
23	# BTC * interest * (# days / 365)															
24	Price / BTC/USD	\$2,700														
25																
26																
27																
28																
29																

Transactions on the Blockchain are public

# The CFTC's Reliance on *AEP Energy Services* Is Misplaced – Gemini's Expert's Opinion Is Admissible



As the district court found, however, the plaintiffs' have repeatedly represented, in both the transaction documents and in tax and regulatory filings, that the natural gas contained in the Storage Facility constitutes "personal property" natural gas and that no "native gas" —or "real property" natural gas —existed in the facility after 1996.

We further conclude that the two recently created regulatory filings, not submitted by the plaintiff's to the district court until after summary judgment motions were filed, which appear to assert that the Storage Facility contains mostly "native gas," and the plaintiffs' expert report purporting the same conclusion, are insufficient to create a genuine issue of material fact on this question, especially in light of our conclusion regarding the inability of the plaintiffs to make such an assertion contrary to their previous representations in this regard.

**There is nothing remotely similar in this case**

## **Statements at Issue**

# The Four Categories



## Prefunding

Statements: 1, 2, 5, 6, 9, 10, 13, 14, 17, 18, 19, 20, 22, 26, 27



## Rebates

Statements: 23, 28



## Self-Trading

Statements: 4, 8, 12, 16, 21, 24, 31



## Volume

Statements: 3, 7, 11, 15, 25, 29, 30

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-8 Filed 07/22/24 Page 3 of 30

Cboe

## Statement 1

The Gemini Exchange is a continuously operated, full-reserve exchange that enables customers to buy and sell digital assets, including bitcoin, for fiat currency or digital assets. The Gemini Exchange currently offers trading in bitcoin in U.S. dollars through a continuous order book with four different order types. **As a full reserve exchange, the Gemini Exchange requires all orders to be fully pre-funded with assets on deposit. Dollars must be deposited prior to placing a buy order to fully fund that buy order and bitcoin must be deposited before placing a sell order to fully fund that sell order.** All open orders on the Gemini Exchange from a Gemini Exchange market participant reduce that market participant's available balance to submit other orders on the Gemini Exchange until that market participant's pending orders are filled or canceled.

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

This public certification does not constitute an implied CFTC endorsement of the use of digital currency generally, or Bitcoin specifically.

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Exhibit B page 2 of 26

22cv4563-CFTC-GEMINI-00017445

Dkt. 83-8 at 4

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 03-6 Filed 07/22/24 Page 3 of 30

Cboe

Statement 2

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(iv) **all orders on the Gemini Exchange, including auction-only orders, must be fully pre-funded;**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

XBT futures are cash-settled futures contracts that are based on the auction price of futures in U.S. dollars on the Gemini Exchange. XBT Futures are designed to reflect economic exposure related to the price of Bitcoin. The final settlement value for XBT Futures will be the official auction price recorded in the nearest prior 144 hours determined at 8:00 pm Eastern time on the final settlement date by the Gemini Exchange.

Bisnode is a digital trust based on the decentralized open source protocol of the permissioned Bitcoin consensus network ("BISNODE NETWORK"). The Bisnode Network runs the decentralized public transaction ledger, known as the Blockchain, on which all Bisnode is recorded. No single entity owns or operates the Bisnode Network. The Bisnode Network is collectively maintained by a distributed user base. Bisnode can be used to

\* This product certification does not constitute or imply a CFTC endorsement of the use of digital currency generally, or Bisnode specifically.

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22cv0363-CFTC-GEMINI-0001745

Exhibit 6, page 2 of 26

Dkt. 83-8 at 9

## **Summary Judgment Should Be Denied**



Case 1:22-cv-04863-RJM Document 173-6 Filed 10/22/24 Page 1 of 30

Cboe

### **Statement 3**

Data from [data.bitcoinity.org](http://data.bitcoinity.org) reflects that as of August 28, 2017 the 20-day moving average of the Gemini Exchange's market share in exchange trading in bitcoin in U.S. dollars was 12.8% and that the 20-day moving average of the Gemini Exchange's trading volume in bitcoin in U.S. dollars was 11,310 bitcoin. As of August 28, 2017, 553 market participants have traded at least once in a Gemini Exchange auction for bitcoin in U.S. dollars. The 20-day moving average of dollar trading value in Gemini Exchange auctions for bitcoin in U.S. dollars as of August 28, 2017 was \$1,739,000.

- This statement is true
  - Materiality is disputed
  - *Mens rea* is disputed

particular computer network (Blockchain Network). The Blockchain Network stores the decentralized public transaction ledger, known as the Blockchain, on which all balances are recorded. No single entity owns or operates the Bitcoin Network. The infrastructure of the Bitcoin Network is collectively maintained by a decentralized user base. Bitcoin can be used to send

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Edited E, page 1 of 2

Dkt. 83-8 at 5

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 03-6 Filed 07/22/24 Page 1 of 30

Cboe

## Statement 4

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

**(v) self-crossing is prohibited on the Gemini Exchange;**

Diligentiam, and CFTC Policy and Procedure X205 ("Gemini Auction Time Frame"). A chart that summarizes the Product specifications is also attached. The terms and conditions for XBT futures and the Agreement will become effective on December 1, 2017 ("Effective Date"). XBT futures will be listed for trading on CFTC on a date to be announced by the Exchange through the issuance of a circular publication or after the Effective Date.

XBT futures are cash-settled futures contracts that are based on the auction price of futures in U.S. dollars for the Gemini Exchange. XBT futures are designed to reflect economic exposure related to the price of Bitcoin. The final settlement value for XBT futures is set for the official auction price recorded in the second party fair location determined at 8:00 pm Eastern time on the final settlement date by the Gemini Exchange.

Bisnode is a digital asset based on the decentralized, open source protocol of the peer-to-peer Bitcoin computer network ("Bitcoin Network"). The Bisnode Network runs the decentralized public transaction ledger, known as the Blockchain, on which all Bisnode is recorded. No single entity owns or operates the Bisnode Network. The infrastructure of the Bisnode Network is collectively maintained by a decentralized user base. Bisnode can be used to

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20240703-CFTC-GEMINI-0001745

Exhibit 6, page 2 of 26

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



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**Cboe**

**Statement 5**

The Gemini Exchange is a continuously operated, full-reserve exchange that enables customers to buy and sell digital assets, including bitcoin, for fiat currency or digital assets. The Gemini Exchange currently offers trading in bitcoin in U.S. dollars through a continuous order book with four different order types. **As a full reserve exchange, the Gemini Exchange requires all orders to be fully pre-funded with assets on deposit.** **Dollars must be deposited prior to placing a buy order to fully fund that buy order and bitcoin must be deposited before placing a sell order to fully fund that sell order.** All open orders on the Gemini Exchange from a Gemini Exchange market participant reduce that market participant's available balance to submit other orders on the Gemini Exchange until that market participant's pending orders are filled or canceled.

This product contains neither recommendations nor conclusions to buy or sell financial instruments or any other security. It is not a research report prepared by an investment advisor under the securities laws. It is not a solicitation to effect any transaction in any instrument. It is not investment advice and may not be relied on as such. It is made available on an "as is" basis without regard to the needs of the recipient. It is not a recommendation to buy or sell specific financial instruments. It is not a research report prepared by an investment advisor under the securities laws. It is not a solicitation to effect any transaction in any instrument. It is not investment advice and may not be relied on as such. It is made available on an "as is" basis without regard to the needs of the recipient. It is not a recommendation to buy or sell specific financial instruments.

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Exhibit 11, page 2 of 22  
22cv4563-CPL-GEMINI-0001/481

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



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**Cboe**

**Statement 6**

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(iv) **all orders on the Gemini Exchange, including auction-only orders, must be fully pre-funded;**

be communicated by the Exchange through the issuance of a circular that is on or after the Effective Date.

NFT tokens are established futures contracts that are based on the auction price of futures in U.S. dollars on the Gemini Exchange. NFT tokens are designed to reflect current expenses related to the issue of tokens. The final settlement value for NFT tokens will be the official auction price (rounded to the nearest penny) for tokens determined at 4:00 p.m. Eastern time on the final settlement date by the Gemini Exchange.

Bisnode is a digital asset based on the decentralized, open source protocol of the previous Bisnode company network ("Bisnode Network"). The Bisnode Network being the decentralized public transaction ledger, known as the Blockchain, on which all Bisnode is recorded. No single entity owns or operates the Bisnode Network. The administration of the Bisnode Network is

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22cv04563-CFTC-GEMINI-0001.FAST  
Edition 11, page 2 of 52

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



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Cboe

Statement 7

Data from [data.bitcoinity.org](http://data.bitcoinity.org) reflects that as of August 28, 2017 the 20-day moving average of the Gemini Exchange's market share in exchange trading in bitcoin in U.S. dollars was 12.8% and that the 20-day moving average of the Gemini Exchange's trading volume in bitcoin in U.S. dollars was 11,310 bitcoin. As of August 28, 2017, 553 market participants have traded at least once in a Gemini Exchange auction for bitcoin in U.S. dollars. **The 20-day moving average of dollar trading value in Gemini Exchange auctions for bitcoin in U.S. dollars as of August 28, 2017 was \$1,739,000.**

Binance is a digital asset based on the decentralized, open source protocol of the peer-to-peer Bitcoin payment network ("Bitcoin Network"). The Bitcoin Network uses the decentralized public transaction ledger, known as the Blockchain, on which all Bitcoin is recorded. No single entity owns or operates the Bitcoin Network. The administration of the Bitcoin Network is

This press release contains forward-looking statements and information that constitute an offering of securities under the federal securities laws, or applicable state securities laws. The information contained herein is not intended to be a prospectus or to constitute an offer to sell or the solicitation of an offer to buy any security.

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22cv04563-CFTC-GEMINI-0001.FABT

Edition 11, page 2 of 52

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

# Summary Judgment Should Be Denied



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## Statement 8

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

### (v) self-crossing is prohibited on the Gemini Exchange;

Validity; Legal Proceedings; and CFTC Policy and Procedure V (Emergency and Physical Emergency Dispositions). A cross that violates the Prohibited specifications is also rejected. The relevant terms and conditions for AMT futures and the Amendment will become effective on [REDACTED], 2017 ("Effective Date"). AMT futures will be listed for trading on CFTC on a date to be announced by the Exchange through the issuance of a circular that is on or after the Effective Date.

AMT futures are established futures contracts that are based on the auction price of interest in U.S. dollars on the Gemini Exchange. AMT futures are denominated in reflect contract expense related to the issue of interest. The final settlement value for AMT futures will be the official auction price (rounded to the nearest penny) for interest determined at 4:00 p.m. Eastern time on the final settlement date by the Gemini Exchange.

Bisnode is a digital asset based on the decentralized, open-source protocol of the previous Bisnode computer network ("Bisnode Network"). The Bisnode Network links the decentralized public transaction ledger, known as the Blockchain, on which all Bisnode is recorded. No single entity owns or operates the Bisnode Network. The administration of the Bisnode Network is

This practice constitutes and remains a non-exclusive and non-exhaustive CFTC guidance. It is not a binding, mandatory, general, or formal specification.

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Edition 11, page 2 of 52

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

# Summary Judgment Should Be Denied



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**CBOE FUTURES EXCHANGE**

**Statement 9**

The Gemini Exchange is a continuously operated, full-reserve exchange that enables customers to buy and sell digital assets, including bitcoin, for fiat currency or digital assets. The Gemini Exchange currently offers trading in bitcoin in U.S. dollars through a continuous order book with four different order types. **As a full reserve exchange, the Gemini Exchange requires all orders to be fully pre-funded with assets on deposit.** **Dollars must be deposited prior to placing a buy order to fully fund that buy order and bitcoin must be deposited before placing a sell order to fully fund that sell order.** All open orders on the Gemini Exchange from a Gemini Exchange market participant reduce that market participant's available balance to submit other orders on the Gemini Exchange until that market participant's pending orders are filled or canceled.

Based on historical exchange experience, it is anticipated that the relevant market will transition under a  
hostile system.

This product participation and risk disclosure statement does not purport to fully describe all of the risks  
of digital currencies generally, or Gemini specifically.  
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Exhibit 12, page 3 of 27

22cv4563-CFTC-GEMINI-0001/134

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

## **Summary Judgment Should Be Denied**



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### **Statement 10**

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(iv) all orders on the Gemini Exchange, including auction-only orders, must be fully pre-funded;

XBT futures are unadjusted futures contracts that are based on the market price of Bitcoin in U.S. dollars on the Gemini Exchange. XBT futures are designed to reflect economic exposure related to the price of Bitcoin. The final settlement value for XBT futures will be the official auction price (rounded to the nearest penny) for Bitcoin determined at 4:00 p.m. Eastern time on the final settlement date by the Gemini Exchange.

Russia is a digital asset hub on the international open source platform of the participant Binance company network ("Binance Network"). The Binance Network hosts the decentralized public transaction ledger known as the Blockchain, on which all Bitcoin is recorded. So right away assets can be recorded via the Bitcoin Network. The infrastructure of the Binance Network is collectively maintained by a decentralized user base. Bitcoin can be used to pay for goods and services or can be converted into fiat currencies, such as the US dollar, rates determined on historic exchange of 10 individual and user-based user (Blockchain) after a longer process.

This product certification (and its accompanying Declaration of Conformity) is CPSC's endorsement of the use of digital currency generally, or Bitcoin specifically.

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Editor 70 page 3 of 21

- This statement is true
  - Materiality is disputed
  - *Mens rea* is disputed

# Summary Judgment Should Be Denied



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## Statement 11

Data from [data.bitcoinity.org](http://data.bitcoinity.org) reflects that as of August 28, 2017 the 20-day moving average of the Gemini Exchange's market share in exchange trading in bitcoin in U.S. dollars was 12.8% and that the 20-day moving average of the Gemini Exchange's trading volume in bitcoin in U.S. dollars was 11,310 bitcoin. As of August 28, 2017, 553 market participants have traded at least once in a Gemini Exchange auction for bitcoin in U.S. dollars. **The 20-day moving average of dollar trading value in Gemini Exchange auctions for bitcoin in U.S. dollars as of August 28, 2017 was \$1,739,000.**

No single entity owns or operates the Bitcoin Network. The administration of the Bitcoin Network is collectively maintained by a decentralized user base. Bitcoin can be used to pay for goods and services or can be converted into fiat currencies such as the US dollar, or other instruments on Bitcoin exchanges or in individual and over-the-counter transactions under a license system.

This product certification and risk disclosure do not constitute or imply a CFTC endorsement of the use of digital currencies generally, or Bitcoin specifically.  
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22cv04563-CFTC-GEMINI-0001764

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- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

# Summary Judgment Should Be Denied



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## Statement 12

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(v) **self-crossing is prohibited on the Gemini Exchange;**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

The Amendment will become effective on [REDACTED] 2017 ("Effective Date"). XBT futures will be listed for trading on CME on a date to be announced by the Exchange through the issuance of a prospectus that is no or after the Effective Date.

XBT futures are risk-reduced financial contracts that are based on the auction price of Bitcoin at U.S. dollars on the Gemini Exchange. XBT futures are designed to reflect economic exposures related to the price of Bitcoin. The final settlement value for XBT futures will be the official auction price (rounded to the nearest penny) the Bitcoin determined at 4:00 p.m. Eastern time on the final settlement day by the Gemini Exchange.

Bitcoin is a digital asset issued on the decentralized, open-source protocol of the peer-to-peer Bitcoin payment network ("Bitcoin Network"). The Bitcoin Network hosts the decentralized public transaction ledger, known as the Blockchain, on which all Bitcoin is recorded. No single entity owns or operates the Bitcoin Network. The administrator of the Bitcoin Network is collectively maintained by a decentralized user base. Bitcoin can be used to pay for goods and services or can be converted into fiat currencies such as the U.S. dollar, or other instruments on Bitcoin exchanges or in individual and over-the-counter transactions under a license system.

This product certification and risk disclosure do not constitute or imply a CFTC endorsement of the use of digital currency generally, or Bitcoin specifically.  
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20240603-CFTC-GEMINI-00017024

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# Summary Judgment Should Be Denied



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**CBOE FUTURES EXCHANGE**

**Statement 13**

The Gemini Exchange is a continuously operated, full-reserve exchange that enables customers to buy and sell digital assets, including bitcoin, for fiat currency or digital assets. The Gemini Exchange currently offers trading in bitcoin in U.S. dollars through a continuous order book with four different order types. **As a full reserve exchange, the Gemini Exchange requires all orders to be fully pre-funded with assets on deposit.** **Dollars must be deposited prior to placing a buy order to fully fund that buy order and bitcoin must be deposited before placing a sell order to fully fund that sell order.** All open orders on the Gemini Exchange from a Gemini Exchange market participant reduce that market participant's available balance to submit other orders on the Gemini Exchange until that market participant's pending orders are filled or canceled.

Before investing in an individual and your broker may recommend seeking a financial advisor.  
This product contains risk and risk disclosure documents or apply a CFTC statement of the use of digital currency products, in those products.  
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Exhibit 9, page 2 of 27  
20240724-CV-TC-GEMINI-0001768

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-NRH Document 83-9 Filed 07/22/24 Page 4 of 23



## Statement 14

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(iv) **all orders on the Gemini Exchange, including auction-only orders, must be fully pre-funded;**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

XBT futures are cash-settled futures contracts that are based on the auction price of Bitcoin at \$1K dollars on the Gemini Exchange. XBT futures are designed to reflect a sensible conversion of the price of Bitcoin. The final settlement value for XBT futures will be the auction price (rounded to the nearest power of ten) determined at 3:00 p.m. (Eastern time) on the final settlement day by the Gemini Exchange.

Bisq is a global peer-to-peer decentralized, open source protocol of the peer-to-peer Bitcoin computer network ("Bitcoin Network"). The Bisq Network forms the decentralized public transaction ledger, known as the Blockchain, on which all Bisq is recorded. No single entity owns or operates the Bisq Network. The infrastructure of the Bisq Network is exclusively maintained by a decentralized user base. Bisq can be used to pay for goods and services or can be converted into fiat currencies such as the U.S. dollar, at rates determined on Bisq exchanges or individual end-user which can be facilitated under a fiat system.

\* This product certification and risk certification do not constitute or imply a CFTC violation of the use of digital currency products, in those capacities.

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Dkt. 83-9 at 9

# Summary Judgment Should Be Denied



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Statement 15

Data from [data.bitcoinity.org](http://data.bitcoinity.org) reflects that as of August 28, 2017 the 20-day moving average of the Gemini Exchange's market share in exchange trading in bitcoin in U.S. dollars was 12.8% and that the 20-day moving average of the Gemini Exchange's trading volume in bitcoin in U.S. dollars was 11,310 bitcoin. As of August 28, 2017, 553 market participants have traded at least once in a Gemini Exchange auction for bitcoin in U.S. dollars. **The 20-day moving average of dollar trading value in Gemini Exchange auctions for bitcoin in U.S. dollars as of August 28, 2017 was \$1,739,000.**

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

©2017 Gemini Trust Company, LLC. The Gemini Network™ is a service mark of Gemini Trust Company, LLC. The Gemini Network™ is exclusively maintained by a designated and listed Broker can be used to pay for goods and services or can be converted into fiat currencies such as the U.S. dollar, at rates determined on Gemini exchanges or in individual end-user which can be determined under a tiered system.

This product certification and risk certificate do not constitute or imply a CFTC-acknowledgment of the use of digital currency generally, or tokens specifically.

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Exhibit 9, page 2 of 23

2024USDCFTCGEMINI0001768

Dkt. 83-9 at 6

# Summary Judgment Should Be Denied



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## Statement 16

There are a number of structural safeguards built into the Gemini Exchange auction process that are specifically designed to promote the integrity of the auction price and make it difficult for a market participant to improperly affect the auction price. Among these features of the auction process are that: ...

(v) **self-crossing is prohibited on the Gemini Exchange;**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

Amendment will become effective on [REDACTED] ("Effective Date"). All futures will be held for trading on CFTC and will be accounted by the Exchange through the issuance of a circular that is or will be the Effective Date.

XBT futures are cash settled futures contracts that are based on the auction price of Bitcoin in US dollars on the Gemini Exchange. XBT futures are designed to reflect sensible exposure related to the price of Bitcoin. The final settlement value for XBT futures will be the official auction price rounded to the nearest power of ten (three decimal places). The XBT futures will be listed on the final settlement date by the Gemini Exchange.

Bitcoin is a digital asset stored on the decentralized, open source protocol of the peer-to-peer Bitcoin computer network ("Bitcoin Network"). The Bitcoin Network forms the decentralized public transaction ledger, known as the Blockchain, on which all Bitcoin is recorded. No single entity owns or operates the Bitcoin Network. The infrastructure of the Bitcoin Network is exclusively maintained by a decentralized user base. Bitcoin can be used to pay for goods and services or may be converted into fiat currencies such as the U.S. dollar, at rates determined on Bitcoin exchanges or individual end-user which are established under a similar system.

This product certification and risk certification do not constitute or imply a CFTC violation of the use of digital currency products, in those products.

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Exhibit 9, page 2 of 27

Dkt. 83-9 at 9

# Summary Judgment Should Be Denied



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The Gemini Auction and the CFTC Bitcoin (USD) Futures Contract is Not Susceptible to Manipulation.

## Statement 17

### Pre-funding required for all orders at the auction.

The pre-funding requirement for all orders on the Gemini Exchange (including both generally and with respect to Gemini Exchange auctions) disincentives potentially manipulative behavior.

with other cash bitcoin markets, this helps keep prices in line with broader market levels.

- **The futures contract will drive even more liquidity and competition to the Gemini auction.** The Gemini Exchange auction focuses trading activity to a single moment in time (the time of the auction), which enhances liquidity, market depth, and price discovery at that time. The settlement of an XBT futures contract to the auction result is likely to offer even greater participation and liquidity in the Gemini package auction.
- **Surveillance of the Gemini auction and interbank by Gemini and CFTC (and all data available to CFTC Market Intelligence office).** In addition to firm-specific data, CFTC will actively surveil for potential manipulation of XBT futures, including through the utilization of both XBT futures trading data and Gemini information with regard to the trading of options on the Gemini Exchange (which CFTC will receive through an information sharing agreement with Gemini).
- **XBT auction collar:** There is a 3% collar on the auction price prepared by the Gemini Exchange numerous prior trials have passed post-
- **Closing cross is industry convention/industry standard.** The Gemini Exchange auction mechanism is similar to the “closing cross” auction utilized on large stock exchanges, which is widely accepted methodology for determining the next-day price for an asset. For example, the Nasdaq’s closing cross auction generates a closing price that is widely used throughout the industry, including Russell Indices, Standard & Poor’s and S&P Dow Jones Industrial Average securities, before those are daily listed on other exchanges, are eligible for the closing price system.

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



CASE 1:22-CV-04563-AKH Document 131-1 Filed 07/24/24 Page 4 of 9  
 FCAI GEMINI TRADING COMPANY LLC, THE GEMINI TRADING COMPANY LLC, GEMINI EXCHANGES, LLC, GEMINI TRUST COMPANY, LLC

March 10, 2017 Auction

On March 10, 2017, an order submitted coupled with large market orders resulted in the Gemini auction price

## Statement 18

While price collars coupled with position limits and surveillance contribute to the soundness of the Gemini auction, **another strength of the auction is Gemini's pre-funding requirement. The need to maintain a cash balance in support of any order means that funds must be in a trader's account before an order is placed or else the Gemini system will reject the order.**

To support large trades, firms would need to carry sizable cash deposits at Gemini where they don't earn interest or transfer money into their account in enough time for funds to clear before entering orders.

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

submitted an accountability order during the test version auction, resulting in 1120 market orders cancelled and another 1553 filled because immediately due to price cap prevent.

Meanwhile, the quantity of orders to buy via market orders actually increased due to the stop indication price. The end result of the auction was price cap prevent of about 15.11 (0.7%), which resulted in the number of market-only sell orders from 24 to 48, and an increase in the volume executed against marketable market-only orders from 81% to 99%.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Exhibit 8, page 3 of 8

Civil 16-3-CFTC-GEMINI-00011981

Dkt. 83-6 at 8

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-6 Filed 05/07/24 Page 1 of 2  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND COMMERCE TRUST COMPANY, LLC



Statement 19

**Cost of Capital** - All orders must be pre-funded — dollars must be deposited prior to placing a buy order and bitcoin must be deposited before placing a sell order— and participants are not permitted to place an order unless they have enough funds in their account to place such order (orders that are submitted without backing funds are rejected). As a result, no participant's outstanding interest on our books can exceed their account balance at any time and all open orders reduce a participant's available balance until such orders are fulfilled or canceled. Therefore, it is costly for a malicious market participant to engage in manipulative tactics.

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

<sup>1</sup>In broad terms, a Vickrey-Clarke-Groves auction is a type of simultaneous auction in which each agent calculates its demand for the good at every possible price and submits it to the auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied of the good.

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-6 Filed 05/07/24 Page 1 of 2  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND COMMERCIAL TRUST COMPANY, LLC



**Time Priority** - We do not permit the cancellation of any auction orders in the final minute leading up to the Gemini Auction Price. **Participants can only add to their position**, thereby (1) **making it costly for them to try to influence the Gemini Auction Price** in the last sixty (60) seconds and (2) reducing the opportunity for “spoofing” of the auction order book.

## Statement 20

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

- **Arbitrage** - A costing crisis is well understood by arbitrageurs, making it easy for market participants to interact with the auction. This arbitrage serves to cause prices to move into proper alignment. Because bitcoin is fungible, it can be arbitrated across exchanges. This constrains the possibility of price manipulation on any one exchange because manipulation of the price on any one venue would require manipulation of the global price of bitcoin to be effective—a prohibitively costly activity. As a result, price discrepancies across trading venues will be reduced as arbitrage forces convergence prices to within the bounds of arbitrage.
- **Price Discovery** - The Gemini Auction focuses trading activity to a single moment. As a result, the quality of the price discovery process is enhanced because of the enhanced liquidity and depth of the market at the concentrated point in time.

<sup>1</sup>In broad terms, a Vickrey auction<sup>1</sup> is a type of simultaneous auction in which each agent calculates its demand for the good at every possible price and submits this to the auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied at that price.

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-6 Filed 05/07/24 Page 1 of 2  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC



**Self-Trade Prevention - We prohibit the same market participant from crossing with himself or herself (either intentionally or unintentionally) on a continuous trading order book or in a Gemini Auction.**

exchanges throughout Europe and Asia. In addition, a closing cross is widely accepted as the end-of-day "price" of a given asset, even if a significant amount of trading volume occurs on multiple venues.

**Gemini Auction** - We believe the Gemini Auction has a number of attributes that promote the integrity of the auction price and discourage manipulative conduct.

- **Arbitrage** - A closing cross is well understood by arbitragers, making it easy for market participants to interact with the auction. This arbitrage serves to cause prices to move into proper alignment. Because bitcoin is fungible, it can be arbitrated across exchanges. This constrains the possibility of price manipulation on any one exchange because manipulation of the price on any one venue would require manipulation of the global price of bitcoin to be effective — a profitably costly activity. As a result, price discrepancies across trading venues will be reduced as arbitrage forces convergence prices to within the bounds of arbitrage.
- **Price Discovery** - The Gemini Auction focuses trading activity to a single moment. As a result, the quality of the price discovery process is enhanced because of the enhanced liquidity and depth of the market at the concentrated point in time.

<sup>1</sup>In broad terms, a Vickreyian (Groveian) auction is a type of simultaneous auction in which each agent calculates its demand for the good at every possible price and submits this to the auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied of the good.

## Statement 21

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-21 Filed 07/07/24 Page 6 of 68  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC

GEMINI

Statement 22

## 19. Could a trader break the auction by distorting the continuous market?

Because we require the Gemini Auction Price to be within 5% of the midpoint of the continuous trading book, it is possible for a malicious market participant to intentionally attempt to exceed this threshold by manipulating either the Gemini Auction Price itself or the midpoint of the continuous trading book. Such manipulation would likely be very easy to detect since it would be concentrated over a short period of time and involve direct interaction with either the price levels at the inside of the continuous trading book (i.e., the highest bid and lowest offer) or the Gemini Auction Price pricing itself. Furthermore, other market participants are strongly economically motivated to counteract or arbitrage any such occurrence in order to receive fills at their desired prices.

Moreover, **the manipulation of the continuous trading book would likely require substantial capital commitment** and not yield a predictable outcome for the malicious market participant. Because the futures contracts settle to the Gemini Auction Price rather than to the continuous market prices, there is no guarantee that contract settlement would be affected favorably for the malicious participant. In fact, in the event of a failed Gemini Auction, the procedure outlined in Question 12 would determine the settlement price, likely thwarting any attempted manipulation.

Similarly, **because placing orders on the continuous market (and in the Gemini Auction) requires capital to be held (as discussed above), spoofing and other manipulative techniques are typically quite expensive and inefficient as well.**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

Confidential Treatment Requested by Gemini Pursuant to FOIA

GEM\_CFTC173218

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-21 Filed 03/07/24 Page 6 of 88  
FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC

GEMINI

Statement 23

**8. Could you please provide more detail on the market makers rebate program? How many market makers are signed up? How much liquidity are they providing to the auctions?**

We have implemented a trading fee program which is available to all of our market participants; **we have no specifically defined market maker program.** In summary, fees are typically charged for liquidity-taking trades, but these fees can be reduced through high trading volumes and maintaining a balance between buy and sell trades; and fees can be charged for liquidity-making trades, but rebates can be earned in a similar way. The details are available at <https://qemini.com/fee-schedule/>. **In a typical month, between 5 and 10 market participants have earned liquidity-making rebates, and these participants typically make up approximately 90% of volume in the auctions.**

- **This statement is true**
- **Materiality is disputed**
- ***Mens rea* is disputed**

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 100-21 Filed 03/07/24 Page 6 of 88  
 FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC  
 AND GEMINI TRUST COMPANY, LLC

GEMINI

**10. Could an auction occur where there is one participant trading with themselves?**

No, we have instituted self-trade prevention.

NYBL.<sup>7</sup> Under the NYBL, a "trust company" has general powers available to banks and trust companies, as well as powers generally associated with trustees and other fiduciaries.

Apart from general fiduciary powers and obligations, the following activities are among those specifically identified in the statute as activities that New York trust companies may conduct with respect to their fiduciary accounts, including (i) the power to accept deposits exclusively in a fiduciary capacity, to receive and disburse money, to transfer, regular and countersign evidences of indebtedness or other securities, and to act as attorney in fact or agent and (ii) the power to accept appointment as receiver, trustee, or committee of the property of an estate or any person in insolvency or bankruptcy proceedings.<sup>8</sup>

A limited purpose trust company must conduct its business and operations subject to the limitations or restrictions set forth in NYDFS's may promulgate in its sole discretion. In practice, most limited purpose trust companies typically engage in activities such as employee benefit trust, personal trust, corporate trust, transfer agency, securities clearance, investment management, and custodial services. A trust company, including a limited purpose trust company like Gemini, can serve as the custodian of customer funds.<sup>9</sup>

Under the NYBL, the same general procedures, requirements and criteria for the formation of a full-service bank apply also to the formation of a limited purpose trust company with two exceptions: (i) no requirement to carry FDIC insurance and (ii) a level of capitalization deemed satisfactory by the Superintendent of NYDFS. Once submitted in acceptable form, a limited purpose trust company application receives the same kind of scrutiny as other bank and trust company proposals and ultimately requires the approval of the Superintendent of NYDFS. In addition, trust companies are subject to many of the same requirements that apply to a bank.

<sup>7</sup> See N.Y. Banking Law § 100 et seq. (McKinney).

Statement 24

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

# Summary Judgment Should Be Denied



To: Leahy, Thomas M. [tleahy@cftc.gov]  
 Cc: Reinstein, Art [Reinstei@cboe.com]  
 From: Gordon, Nicole [gordon@cboe.com]  
 Sent: Tues 8/1/2017 5:25:34 PM (UTC-4:00)  
 Subject: CFTC Data Request Response - CFE FOIA CONFIDENTIAL TREATMENT REQUESTED  
 CFE FOIA Request Information and Email Dated August 1 2017.pdf

From:

**To:** Leahy, Thomas M., Jr. [tleahy@cftc.gov]  
**Cc:** Reinstein, Art [Reinstei@cboe.com]  
**From:** Gordon, Nicole [gordon@cboe.com]  
**Sent:** Tues 8/1/2017 5:25:34 PM (UTC-4:00)  
**Subject:** CFTC Data Request Response – CFE FOIA CONFIDENTIAL TREATMENT REQUESTED  
CFE FOIA Request Information and Email Dated August 1 2017.pdf

Tom,

I am sending overnight for delivery tomorrow via FedEx a package with a CD-ROM containing the raw data used to create the graphs and charts in the Appendix of the cash-settled (USD) bitcoin futures product presentation that occurred on July 25, 2017. I am also attaching a letter requesting FOIA confidential treatment of this email and the information contained on the CD-ROM.

Please let me know if you do not receive the package tomorrow and also if you have any questions or would like further information.

Thanks,  
 Nicole

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Exhibit 4, page 1 of 2

2024563-CFTC-GEMINI 00017360

## Statement 25

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14

## Gemini Auction Mechanics



➤ Protections

Statement 26

**As with all Gemini orders, auction orders must be fully (pre-) funded**

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

5

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-0000883

Exhibit 2, page 8 of 13

Dkt. 83-2 at 7

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 4 of 14

## CFE Bitcoin Futures Highlights



Statement 27

**Prefunding requirements for auction-only orders** allows for heightened surveillance

### Market Regulation

- Arbitrage against other cash bitcoin markets keeps prices in line.
- Liquidity event drives greater participation and offers more transparency
  - Gemini Auction volume is already roughly 2x the average maximum trade size of other bitcoin exchanges
  - Indicative auction prices are shared with the market
- Price collar on the auction and telescoped position limits dia-incentivize manipulative behavior
- Prefunding requirements for auction-only orders allows for heightened surveillance
- Comparable to auctions used to settle other futures contracts
  - VIX Futures – CBOE's SPX SOQ
  - S&P 500 Futures – Primary market SOQ

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-0000680

Exhibit 2, page 3 of 13

Dkt. 83-2 at 4

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14

## Gemini Auction Mechanics



» Protections

Statement 28

### Market maker trading fee rebates encourage participation

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

5

CONFIDENTIAL - SUBJECT TO PROTECTIVE  
ORDER

22cv4563-CFTC-GEMINI-0000883

Exhibit 2, page 8 of 13

Dkt. 83-2 at 7

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 4 of 14



Statement 29

## CFE Bitcoin Futures Highlights

- Cash-settled into a liquid, transparent auction

**Gemini Auction volume is already roughly 2x the average maximum trade size of other bitcoin exchanges**

### Market Regulation

- Arbitrage against other cash bitcoin markets keeps prices in line.
- Liquidity event drives greater participation and offers more transparency
  - Gemini Auction volume is already roughly 2x the average maximum trade size of other bitcoin exchanges
  - Indicative auction prices are shared with the market
- Price collar on the auction and telescoped position limits dis-incentivize manipulative behavior.
- Prefunding requirements for auction-only orders allows for heightened surveillance
- Comparable to auctions used to settle other futures contracts
  - VIX Futures – CBOE's SPX SOQ
  - S&P 500 Futures – Primary market SOQ

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-0000680

Exhibit 2, page 3 of 13

Dkt. 83-2 at 4

# Summary Judgment Should Be Denied



## Statement 30

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### Gemini Auction



CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

22cv4563-CFTC-GEMINI-0000881

Exhibit 2, page 4 of 13

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

Dkt. 83-2 at 5

# Summary Judgment Should Be Denied



Case 1:22-cv-04563-AKH Document 83-2 Filed 03/22/24 Page 7 of 14

## Gemini Auction Mechanics



Statement 31

### Self-crossing prohibited

- Time priority encourages measured growth rather than "gaming"
- Market maker trading fee rebates encourage participation
- Real-time monitoring by Gemini staff

- This statement is true
- Materiality is disputed
- *Mens rea* is disputed

CBOE FUTURES EXCHANGE

FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, LLC

22cv4563-CFTC-GEMINI-0000883

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Exhibit 2, page 8 of 13

Dkt. 83-2 at 7

## The Disputed Statements

# There Are Fact Disputes Over Who Made the Statements in the August 25 Submission (Statements 22-24)



Case 1:22-cv-04563-AKH Document 109-23 Filed 08/07/24 Page 6 of 86  
PDA CONFIDENTIAL TREATMENT REQUESTED BY COBO FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC



## Questions for Gemini

4. What are the requirements and responsibilities resulting from Gemini's licensing with the NYSDFS?

**Regulatory Oversight:** Gemini Trust Company, LLC ("Gemini" or "NYC") worked closely with the New York State Department of Financial Services (the "NYSDFS") to obtain a limited purpose trust company license. The term "limited purpose trust company" refers to entities that are chartered under the bank and trust company provisions of the New York Banking Law ("the NYBL").<sup>1</sup> Under the NYBL, a "trust company" has general powers available to banks and trust companies, as well as powers generally associated with trustees and other fiduciaries.

Apart from general fiduciary powers and obligations, the following activities are among those specifically authorized in this status as activities that New York trust companies may conduct with respect to their fiduciary accounts, including (i) the power to accept deposits incidentally in a fiduciary capacity, to receive and disburse money, to transfer, register and countersign evidences of indebtedness or other securities, and to act as attorney in fact or agent and (ii) the power to accept appointment as receiver, trustee, or committee of the property of an estate of any person in insolvency or bankruptcy proceedings.<sup>2</sup>

A limited purpose trust company must conduct its business and operations subject to the limitations or restrictions as the NYSDFS may prescribe in its sole discretion. In practice, most limited purpose trust companies typically engage in activities such as employee benefit trust, personal trust, corporate trust, trustee agency, securities clearance, investment management and custodial services. A trust company, including a limited purpose trust company like Gemini, can serve as the custodian of customer funds itself.

Under the NYBL, the same general procedures, requirements and criteria for the formation of a full-service bank apply also to the formation of a limited purpose trust company with two exceptions: (i) no requirement to carry FDIC insurance and (ii) a level of capitalization deemed satisfactory by the Superintendent of NYSDFS. Once submitted in acceptable form, a limited purpose trust company application receives the same level of scrutiny as other bank and trust company proposals and ultimately requires the approval of the Superintendent of NYSDFS. In addition, trust companies are subject to many of the same requirements that apply to a bank.

<sup>1</sup> See N.Y. Banking Law § 103 et seq. (McKinney).

<sup>2</sup> id.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER  
08/07/24, page 6 of 87

22cv04563-CFTC GEMINI 00017763

- Sent by Cboe to CFTC
- No Gemini employees copied
- Cboe made "ultimate[] ... decision to submit"
- Cboe had ability to modify before submitting
- Gemini couldn't force Cboe to submit

# There Are Fact Disputes Over Who Made the Statements in the September 12 Submission (Statements 19-21)



Case 1:22-cv-04563-AKH Document 109-14 Filed 06/07/24 Page 125 of 148  
POM CONFIDENTIAL TREATMENT REQUESTED BY COBO FUTURES EXCHANGE, LLC  
AND GEMINI TRUST COMPANY, LLC



**Background** - The Gemini Trust Company, LLC ("Gemini" or "we") designed our auction (the "Gemini Auction") to provide an opportunity for both buyers and sellers to trade in an instant of elevated liquidity and price discovery. The Gemini Auction determines a final auction price (the "Gemini Auction Price"), which is the price at which the greatest aggregate buy quantity and sell quantity from all eligible orders can be satisfied. A key feature of this type of auction design is that it approximates the results of the Vickreyian Ascending Auction that is used in standard economics textbooks to describe how orders and market clearing quantities are determined by the forces of supply and demand. Within the auction design, the market is open to accepting bids and offers until the time the auction algorithm is run.<sup>1</sup> Because the Gemini Auction features participants on a single point-to-point trading network, making price discovery more resistant to manipulation and manipulative conflict. The Gemini Auction mechanism, often referred to as a "closing outcry," has a tried and true track record – it is similar to the auction mechanism used by NYSE Arca, Nasdaq, Bats, and other large stock exchanges throughout Europe and Asia. In addition, a closing outcry is widely accepted as the end-of-day "price" of a given asset, even if a significant amount of trading volume occurs on multiple venues.

**Gemini Auction** - We believe the Gemini Auction has a number of attributes that promote the integrity of the auction (and discourage manipulation), namely:

- **Arbitrage** - A closing outcry is well understood by arbitrageurs, making it easy for market participants to interact with the auction. This arbitrage serves to lower prices to move into proper alignment. Because bidders are fungible, it can be arbitrated across exchanges. This minimizes the possibility of price manipulation on any one exchange because manipulation of the price on any one venue would require manipulation of the greater pool of bidders to be effective – a potentially costly strategy. As a result, price discontinuities across trading venues will be reduced as emerging forces converge prices to within the bounds of arbitrage.
- **Price Discovery** - The Gemini Auction focuses trading activity to a single moment. As a result, the quality of the price discovery process is enhanced because of the enhanced liquidity and depth of the market at the concentrated point in time.

<sup>1</sup> In broad terms, a Vickreyian Ascending auction is a type of simultaneous auction in which each agent calculates its demand for the good at every possible price and submits this to an auctioneer. The price is then set so that the total quantity demanded across all agents equals the total quantity supplied of the good.

- Sent by Cboe to CFTC
- No Gemini employees copied
- Cboe made "ultimate[] ... decision to submit"
- Cboe had ability to modify before submitting
- Gemini couldn't force Cboe to submit

# There Are Fact Disputes Over Who Made the Statements in the November Talking Points (Statement 17)



Case 1:22-cv-04563-AKH Document 109-32 Filed 06/07/24 Page 3 of 3

SAC Draft of November 2, 2017  
CONFIDENTIAL

**The Gemini Auction and the CFE Bitcoin (USD) Futures Contract is Not Susceptible to Manipulation:**

- **Positive CBOE staff comments.** Cboe and Gemini have worked with CBOE staff for several months to prepare the contract filing, and Chris Gordon has indicated that staff has no further questions or concerns for the self-certification filing.
- **Position limits on the futures contract.** CFE will have timestamped position limits for XBT futures; no more than 1,000 contracts net long or net short during the last 5 trading days.
- **Pre-funding required for all orders at the auction.** The pre-funding requirement for all orders on the Gemini Exchange (including Cboe generally and with respect to Gemini Exchange auctions) guarantees potentially relevant parties liquidity.
- **All participants known and identified.** All participants on the Gemini Exchange and auction are identified and will be listed to all parties to their trading accounts via CFE futures.
- **No cancellations or last minute.** No cancellations are allowed in Gemini auctions only after 9:30 AM Eastern Time (4:00 PM in London time).
- **Transparent auction rule indicates pricing and arbitrage opportunities with other exchanges.** exchanges reduce manipulation costs. The transparency of the Gemini auction process, which publishes indication pricing leading up to the auction result, encourages arbitrage opportunities with other cash Bitcoin markets. This helps to organize the market with broadest market reach.
- **The futures contract will drive even more liquidity and competition to the Gemini auction.** The futures exchange auction allows trading activity to be single sourced in time (the time of the auction), which enhances liquidity, market depth, and price discovery at that time. The placement of an XBT futures contract to the auction result is key to drive even greater participation and liquidity to the Gemini Exchange auction.
- **Transparency of the Gemini auction and order book by Gemini and CFE (and off site providers to CFTC Market Intelligence office).** In addition to these traditional aspects, CFE will actively monitor the potential manipulation of XBT futures, including through the collection of daily XBT futures trading data and Gemini information with regard to the trading of Bitcoin on the Gemini Exchange (which CFE will receive through an information sharing agreement with Gemini).
- **SPX market editor.** There is a 5% collar on the auction price compared to the Gemini Exchange continuous order book mid-point price.
- **Closing bid is industry standard/Industry standard.** The Gemini Exchange auction mechanism is similar to the "closing bids" auction method used on large stock exchanges, which is a widely accepted mechanism for determining the end-of-day price for an asset. For example, the NYSE closing price auction generates a closing price that is widely used throughout the industry, including Russell Indices, Standard & Poor's and Dow Jones. All Nasdaq securities, except those listed on other exchanges, are eligible for the closing auction.

- Submitted by lawyer named Ken Raisler
- Decision to send made during call between Raisler, Reinstein and Gordon – with nobody from Gemini involved
- Cboe made “ultimate[] ... decision to submit
- Cboe had ability to modify before submitting
- Gemini could not force Cboe to submit

# Motion in Limine 1

## Gemini Seeks to Preclude



- **Issue 1:** What decisions the CFTC made or could have made regarding the Self-Certification;
- **Issue 2:** What information the CFTC considers when reviewing self-certifications or compliance with Core Principle 3;
- **Issue 3:** The CFTC's evaluation, review, understanding, or analysis of the Bitcoin Futures Contract or Gemini;
- **Issue 4:** Why the CFTC did or did not ask for specific information before CFE filed the Self-Certification;
- **Issue 5:** The CFTC's understanding of "pre-funding"; and
- **Issue 6:** Whether anything said in connection with the Self-Certification was false or misleading.

## Classic Sword and Shield Situation



**The CFTC should be precluded from offering evidence on topics where it refused to provide discovery**

## MIL 1: Questions

# The CFTC's August 17 Questions



**Christopher Goodman**  
*Economist*



**Questions for CFE:**

1. Does CFE plan on providing any "hedge" or other exemptions to the proposed futures contract position limits?
2. What is the basis of the proposed position limits? How do the contract position limits compare to the size of the daily Gemini auctions?
3. Does CFE have the ability to access Gemini trade data? Would CFE have the ability to share that data with the commission?

**Questions for Gemini:**

4. What are the requirements and responsibilities resulting from Gemini's licensing with the NYS DFS?
5. How would one arbitrage across Gemini and other bitcoin platforms? It is argued that bitcoin is hard to arbitrage across markets given transaction costs and the slow settlement processing time. Could you please provide information to show that prices on Gemini can be successfully arbitrated (Ex. Strong correlation in price changes between Gemini prices and prices on other exchanges? When prices get out of line they quickly converge?)
6. Does Gemini have insights into participant's positions on other Bitcoin exchanges? Are participants contractually obligated to share information with Gemini on their Bitcoin positions or activity away from the Gemini Exchange?
7. How does Gemini envision forks in the bitcoin blockchain affecting continuous trading, the auction process and prices?
8. **Could you please provide more detail on the market makers rebate program? How many market makers are signed up? How much liquidity are they providing to the auctions?**
9. Does Gemini envision adopting any minimum thresholds on numbers of participants and auction volumes to consider an auction successful?
10. Could an auction occur where there is one participant trading with themselves?

Dkt. 100-36 at 2-3

# Gemini's August 25 Answers



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 FOIA CONFIDENTIAL TREATMENT REQUESTED BY CBOE FUTURES EXCHANGE, INC.  
 AND GEMINI TRUST COMPANY, LLC.

## GEMINI

### Questions for Gemini

4. What are the requirements and responsibilities resulting from Gemini's licensing with the NYDFS?

**Regulatory Oversight:** Gemini Trust Company, LLC ("Gemini" or "we") entered into a limited purpose trust company license with the New York State Department of Financial Services ("the NYDFS") to operate a limited purpose trust company. The term "limited purpose trust company" refers to entities that are chartered under the bank and trust company provisions of the New York Banking Law ("the NYBL"). Under the NYBL, a "trust company" has general powers associated with banks and trust companies, as well as powers generally associated with trustees and other fiduciaries.

Apart from general fiduciary powers and obligations, the following activities are among those specifically identified in the statute as activities that New York trust companies may conduct with respect to their fiduciary accounts, including (i) the power to accept deposits exclusively in a fiduciary capacity; to receive and disburse money, to transfer, register and convert evidences of indebtedness or other securities, and to act as attorney in fact or agent; and (ii) the power to accept appointment as receiver, trustee, or committee of the property of an estate of any person in insolvency or bankruptcy proceedings.<sup>7</sup>

A limited purpose trust company must conduct its business and operations subject to the limitations or restrictions as the NYDFS may prescribe in its sole discretion. In practice, most limited purpose trust companies typically engage in activities such as employee benefit/trust, personal trust, corporate trust, trustee agency, securities clearing, investment management, and custodial services. A trust company, including a limited purpose trust company like Gemini, can serve as the custodian of customer funds held.

Under the NYBL, the same general procedures, requirements and criteria for formation of a full-service bank apply also to the formation of a limited purpose trust company with two exceptions: (i) no requirement to carry FDIC insurance and (ii) a level of capitalization deemed satisfactory to the Superintendent of NYDFS. Once submitted in acceptable form, a limited purpose trust company application receives the same kind of scrutiny as other banks and trust company proposals, and ultimately requires the approval of the Superintendent of NYDFS. In addition, trust companies are subject to many of the same requirements that apply to a bank.

<sup>7</sup>See N.Y. Banking Law § 160 et seq. (NYBL).

Confidential Treatment Requested by Gemini Pursuant to FOIA

CRM\_CFTC17321B

### 8. Could you please provide more detail on the market makers rebate program? How many market makers are signed up? How much liquidity are they providing to the auctions?

We have implemented a trading fee program which is available to all of our market participants; we have no specifically defined market maker program. In summary, fees are typically charged for liquidity-taking trades, but these fees can be reduced through high trading volumes and maintaining a balance between buy and sell trades; and fees can be charged for liquidity-making trades, but rebates can be earned in a similar way. The details are available at <https://gemini.com/fee-schedule/>. In a typical month, between 5 and 10 market participants have earned liquidity-making rebates, and these participants typically make up approximately 90% of volume in the auctions.

### 9. Does Gemini envision adopting any minimum thresholds on numbers of participants and auction volumes to consider an auction successful?

At this time, we have not, and we have not seen similar requirements for the point-in-time auctions of other asset classes. We strongly believe market forces will encourage participation in auctions which affect futures settlement, especially if such participants observe arbitrage opportunities.

### 10. Could an auction occur where there is one participant trading with themselves?

No, we have instituted self-trade prevention.

## The CFTC Blocks Questioning



**Christopher Goodman**  
*Economist*



Q. Do you recall why you asked Question 10 to Exhibit 13?

**MR. RODGERS:** **Objection on the basis of the deliberative process privilege. And an instruction not to answer.**

Q. Do you recall why you asked Question 8 on Exhibit 13?

**MR. RODGERS:** **Same objection. Same instruction.**

# The CFTC's Arguments on Summary Judgment



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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
COMMODITY FUTURES TRADING COMMISSION	
Plaintiff	12-cv-04563-AKH
	(Bkfst. Attn: C. DiSantis)
GEMINI TRUST COMPANY, LLC	
Defendant.	
PLAINTIFF COMMODITY FUTURES TRADING COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT	

COMMODITY FUTURES TRADING  
COMMISSION  
Division of Enforcement  
200 Broadway, 10th Floor  
New York, NY 10007  
(646) 736-9700

May 7, 2024

*Third*, after Gemini represented it had a market maker rebate program on July 25, 2017,

the CFTC inquired directly, in writing, for more information about Gemini's market maker rebate program. (56.1 Statement ¶¶ 73-74; Ex. 34 at GEM\_CFTC085490.) The CFTC's direct inquiry further substantiates the materiality of Gemini's rebate practices to the CFTC's review of the product certification. *See United States v. Chan Lo*, 2016 WL 9076234, at \*8 (S.D.N.Y. Feb. 4, 2016) ("The false statements may be material to any proper matter of inquiry, including collateral matters that might influence the outcome of decisions . . ."), *aff'd*, 679 F. App'x 79 (2d Cir. 2017). And, the fact that bespoke fee arrangements that Gemini provided to certain market makers were being exploited until September 2017 as part of a collusive or wash trading scheme (which, according to Gemini, manipulated its exchange) underscores the importance of market marker rebate practices to trading volume and liquidity, and thus to the CFTC's review. (56.1 Statement ¶¶ 134-144.)